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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

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CITIBANK, N.A.,

*Petitioner,*

v.

NGOC QUANG TRINH,

*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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ROBERT H. BORK
5171 Palisade Lane, N.W.
Washington, D.C. 20016

ARNOLD M. LERMAN *
JAMES S. CAMPBELL
DAVID WESTIN
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000

KENNETH S. GELLER
MARK I. LEVY
MAYER, BROWN & PLATT
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006

*Counsel for Petitioner*

* Counsel of Record

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## QUESTION PRESENTED

Whether, contrary to the design of federal banking regulation, a United States bank may be held liable for deposits placed with its branch in a foreign country when the foreign government prevents the branch from repaying those deposits.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

---

Citibank, N.A. ("Citibank") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.[1]

## OPINIONS BELOW

The opinion of the court of appeals (App. A) is reported at 850 F.2d 1164. The orders of the court of appeals denying petitioner's petition for rehearing and sug-

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[1] Citibank is a wholly-owned subsidiary of Citicorp. The only subsidiaries or affiliates of Citibank whose stock may be publicly held are: Banco Honduras, S.A., Banco Internacional de Colombia, S.A., Central Holdings Corp., Citibank Espana, S.A., Citibank Italia, S.p.A., Citibank Portugal, S.A., CityTrust Banking Corp., Compagnie Generale de Banque Citibank, Famibank, S.A., Fuyo General Lease Co., Ltd., KKB Bank AG, Saudi American Bank, Taiwan First Investment & Trust Co., Ltd., and the United Bank of Trinidad and Tobago Limited.

gestion for hearing *en banc* (App. B) are unreported. The opinion and order of the district court (App. C) are reported at 623 F. Supp. 1526.

## JURISDICTION

The judgment of the court of appeals was entered on July 8, 1988, and the orders denying rehearing were entered on September 21 and September 22, 1988. The petition for a writ of certiorari is therefore due on December 20, 1988. This Court has jurisdiction to issue the writ under 28 U.S.C. § 1254(1) (1982).

## STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The statutory provisions and regulations involved are reprinted at Appendices D-H.

## STATEMENT

This case presents a question of vital importance to the federal banking system. As the United States stated in its *amicus curiae* brief below, the result reached by the Sixth Circuit "is contrary to sound policy and the national interest" and poses a serious threat to the U.S. banking system.

For nearly a century, U.S. banks have participated in foreign banking markets through branch offices. There are now over 900 branches of U.S. banks operating in 73 countries worldwide, owing to their depositors the equivalent of $225 billion.[2] For most purposes, these foreign branches operate as foreign banks: to a large extent, they obtain funds for their operations by taking deposits

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[2] *See* Department of Treasury, *National Treatment Study: Report to Congress on Foreign Government Treatment of U.S. Commercial Banking and Securities Organizations (1986 Update)* at 20; Brief for the United States as Amicus Curiae at 2, *Wells Fargo Asia Ltd. v. Citibank, N.A.*, 852 F.2d 657 (2d Cir. 1988) (No. 87-7685).

from nationals of the foreign country, they lend funds in that country, and they are regulated by the government of that country.

In times of political or financial instability, foreign authorities may and often do take actions directly interfering with the local operations of banks. These actions include imposing exchange controls, licensing or restricting payments, closing the banks, and seizing or immobilizing bank assets. When foreign governments take such actions, they frequently prevent branches of U.S. banks from repaying their depositors. This has occurred, for example, in the Soviet Union, China, Cuba, Vietnam, and more recently in the Philippines, Mexico, and Panama.

U.S. banks incur substantial losses when foreign governments assert control over the assets of their foreign branches. In recent years, however, U.S. banks have been confronted with a new and greatly increased risk. After foreign governments have taken control of their branches' assets, U.S. banks have faced claims in U.S. courts that they should use their U.S. assets to repay deposits placed in the foreign branches. Simply put, depositors with the foreign branches have sought to require U.S. banks to compensate them for the foreign government's actions.

The present case graphically illustrates this new risk of liability. This case arises from a savings account in Vietnamese currency (piasters) opened in Vietnam by a Vietnamese citizen. In July 1974, respondent's father deposited piasters with the Saigon branch of Citibank, N.A. ("Citibank/Saigon") and opened a joint passbook savings account in the name of himself and respondent. Respondent's father signed a standard Citibank/Saigon deposit agreement, providing that deposits would be repaid only in piasters and only at Citibank/Saigon. App. at 3a. Under the agreement, Citibank was not responsible for depositor losses resulting from governmental action or other causes beyond Citibank's control. *Id.* The

account paid interest at the annual rate of 19%—more than three times the maximum rate of 5% that respondent could then have earned if the deposit had been placed in dollars with Citibank in the United States. *Id.* at 3a, 27a.

On April 24, 1975, on the eve of the communist takeover in Vietnam, the U.S. government evacuated American citizens and Vietnamese employees of U.S. firms, including Citibank/Saigon. Acting in close coordination with U.S. embassy officials, the remaining Citibank/Saigon personnel turned the branch over to the South Vietnamese central bank. The central bank announced the next day that it would assume all of the branch's deposit obligations. App. at 4a. Less than a week later, Saigon fell to North Vietnamese forces. After declaring victory and confiscating all banks, the North Vietnamese government announced that it would take responsibility for "settlement of debts, deposits, savings and all other sources of capital in the economy." *Id.* at 5a.

In 1984, respondent, who had moved to the United States, sued Citibank in the United States District Court for the Eastern District of Michigan for the value of the piaster deposit plus interest. The district court ruled in favor of respondent after a bench trial. The trial court held that the deposit agreement between respondent's father and Citibank/Saigon had created a payment obligation that ultimately became binding on the Citibank home office when the Saigon branch was evacuated. App. at 39a, 57a. In the court's view, this payment obligation was not excused by the doctrine of *force majeure* because Citibank personnel were evacuated before the branch was forcibly seized by enemy troops; nor was the obligation assumed or seized by the Vietnamese central bank (either before or after the fall of Saigon) because it "left" Vietnam and "sprang" to the United States when the Citibank employees were evacuated. *Id.* at 49a, 50a.

Citibank appealed to the U.S. Court of Appeals for the Sixth Circuit. It argued that it was absolved from liability by the deposit agreement, by *force majeure*, and by Vietnam's assumption of the branch's liabilities; in any event, Citibank argued, the decision of the district court was contrary to United States law. The United States appeared as *amicus curiae* in support of Citibank's position. The government argued that the district court's decision was "contrary to the national interest" and "could affect the safety and soundness of U.S. banks and the U.S. banking system." Brief for the United States as Amicus Curiae at 23, 33, *Trinh v. Citibank, N.A.*, 850 F.2d 1164 (6th Cir. 1988) (No. 86-1258).

A divided panel of the court of appeals affirmed. Although it applied Vietnamese law to construe the deposit agreement and to determine the applicability of *force majeure*, the majority's decision rested fundamentally upon generic common law principles. Thus, the court ruled that neither the deposit agreement nor *force majeure* enabled Citibank to escape application of a "general banking principle" that the home office of a U.S. bank "is *ultimately liable*" for the obligations of its branches. App. at 9a (emphasis in original). It held that "[t]his well-established principle of ultimate liability" renders a U.S. bank liable for a deposit placed in a foreign branch if the branch cannot pay because of "political events." *Id.* The court also relied on a so-called "spring and cling" doctrine—nowhere found in Vietnamese law—under which obligations of a foreign branch are thought to "spring back and cling to the home office" when the branch is closed. *Id.* at 16a, 17a. The majority failed to respond in any way to the argument of the United States government and Citibank that application of these principles conflicted with federal law and policy. Senior Judge Brown dissented.

## REASONS FOR GRANTING THE PETITION

This case and a companion case in this Court[3] present a recurring question of critical importance to this Nation's banking system: whether a U.S. bank may be held liable to depositors in its foreign branch when a foreign sovereign prevents the branch from repaying the deposit accounts. Here, it is undisputed that respondent's account was opened in Vietnam by a Vietnamese national, was carried on the books of Citibank's Vietnam branch, was denominated in Vietnamese piasters, and—by the terms of the deposit agreement—was repayable only in Vietnam in piasters. It also is undisputed that Citibank made no express agreement to repay the account in the United States if confiscation or expropriation of the branch's assets prevented repayment in Vietnam; on the contrary, both Vietnamese law and the deposit agreement specifically provided that the depositor bore the risk of *force majeure* (App. at 8a).

Nevertheless, the court of appeals held Citibank liable for the Vietnamese government's acts. This result threatens the long-standing federal banking policy that, absent an express agreement to the contrary, foreign depositors must look to their foreign government—not U.S. banks—for repayment of deposits made at foreign branches when the government prevents the branches themselves from repaying. The decision below collapses the distinction carefully established in federal law between domestic and foreign deposits.

Reflecting these overriding federal concerns, the United States government filed a brief as *amicus curiae* in the court below expressing the unanimous views of the Department of Justice, the Department of the Treasury, the Federal Reserve Board, the Comptroller of the Cur-

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[3] *See Wells Fargo Asia Ltd. v. Citibank, N.A.*, 852 F.2d 657 (2d Cir. 1988). Citibank will file a petition for certiorari in *Wells Fargo* on or before the due date of January 25, 1989.

rency, the Federal Deposit Insurance Corporation, and the Department of State. The United States specifically criticized the court of appeals' "spring and cling" theory and advised the court that imposing liability on American home offices "could affect the safety and soundness of U.S. banks and the U.S. banking system." [4] The Sixth Circuit disregarded the concerns of the United States.

Unless reviewed by this Court, the court of appeals' decision will have a severe impact on United States banks and the federal banking system. The stakes are high; foreign branches now owe more than $200 billion to their depositors. The economic plight of heavily indebted countries and political instability throughout the world increase the risk of adverse foreign government action. This Court should grant certiorari to establish a federal rule that a U.S. bank, unless it has expressly agreed otherwise, may not be held liable for deposits made with its branch in a foreign country when the foreign government prevents the branch from repaying such deposits.

**A. Federal Law and Policy Establish That a U.S. Bank May Not Be Held Liable for Deposits Made with Its Branch in a Foreign Country When the Foreign Government Prevents the Branch from Repaying Such Deposits.**

The decision below threatens two fundamental federal banking policies. First, since the enactment of the Federal Reserve Act in 1913, federal banking policy has vigorously promoted the establishment of foreign branches of U.S. banks "for the furtherance of the foreign commerce of the United States, and to act if required to do so as fiscal agents of the United States." 12 U.S.C. § 601 (1982). Second, federal banking policy is designed to ensure the safety and soundness of the U.S. banking system.

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[4] Brief for the United States as Amicus Curiae at 33, *Trinh*, *supra*.

To further these policies, federal law has long distinguished between the regulation of U.S. banks and their foreign branches. The core of this distinction is a basic principle—exactly the opposite of the rule relied on by the court of appeals—that the depositor in a foreign branch of an American bank bears the risk that repayment of the account may be prevented by acts of the government of the foreign country in which the branch is located.[5]

The distinction is reflected in a number of specific federal statutes and regulations. First, domestic deposits are subject to a reserve requirement that directs banks to set aside a certain percentage of their assets and prohibits the use of such funds for loans or other investments. By contrast, the Federal Reserve Board has consistently concluded that foreign deposits payable solely abroad are exempted from the reserve requirement. *See* 4 Fed. Res. Bull. 1123 (1918); 35 Fed. Reg. 2768 (1970); 1 Fed. Res. Reg. Serv. at ¶ 2-330 (Staff Op., Feb. 23, 1982); *id.* at ¶ 2-330.01 (Staff Op., Mar. 21, 1983); *id.* at ¶ 2-330.1 (Staff Op., July 29, 1983). As the Board has explained, this exclusion rests on the principle that the foreign depositor, rather than the United States bank, bears the risk that a foreign government will interfere with the foreign branch (35 Fed. Reg. 2768):

> [A] customer who makes a deposit that is payable solely at a foreign branch assumes whatever risk may exist that the foreign country might impose restrictions on withdrawals.

In 1980, Congress amended the Federal Reserve Act to incorporate the Federal Reserve Board's long-standing interpretation (12 U.S.C. § 461(b)(6) (1982)), stating

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[5] This general principle is subject to a recognized exception that U.S. banks may guarantee that deposits with their foreign branches may be paid in the United States. The scope of that exception, which is not involved in this case, is at issue in Citibank's companion petition in the *Wells Fargo* case. *See* note 3, *supra*.

that the "express . . . intent of the legislation [is] not to disturb the classifications as between domestic and foreign deposits which have been developed under existing law." H.R. Rep. No. 263, 96th Cong., 1st Sess. 10 (1979).

Second, domestic deposits—but not foreign branch deposits—are covered by the federal deposit insurance program and are included in the assessments banks pay for FDIC insurance. *See* 12 U.S.C. § 1813(*l*)(5)(A) (1982). The FDIC system is part of the federal "safety net" for domestic depositors in the event of the insolvency of an American bank, and is not intended to insure deposits payable abroad.

Third, Congress and the Federal Reserve Board have recognized the need to take very different approaches to foreign branches of U.S. banks in response to the local business environment in which such branches operate. Thus, when U.S. banks were limited in the rate of interest they could pay on domestic deposits, Congress and the Federal Reserve Board exempted deposits made with foreign branches of U.S. banks. *See, e.g.*, 12 C.F.R. § 217.0(c) (1975). Similarly, Congress has authorized foreign branches of U.S. banks to engage in various activities abroad that may not be permitted in the United States. *See* 12 U.S.C. § 604a. (1982).

In addition to furthering federal banking policies, the differences between regulations for U.S. banks and for their foreign branches reflect the understanding that the branches function like other banks in the foreign country and are primarily regulated by the governments of the countries where they operate. Foreign governments are responsible for authorizing the establishment and regulating the day-to-day operations of foreign branches including matters such as permissible activities, reserve requirements, and closure. In the present case, for example, the government of South Vietnam extensively regulated Citibank's Saigon branch, requiring that the

branch keep specified reserves in the country (App. at 2a), that it be operated as a branch rather than as a subsidiary of Citibank (*id.*), that it be maintained as a separate entity with assets, funds, books, and records segregated from all other Citibank operations (*id.*), and that it hold all of its assets in piasters (*id.*). More generally, this allocation of regulatory authority to the countries where foreign branches are located is consistent with the understanding among bank regulators around the world.[6]

The court of appeals' decision in this case runs roughshod over the differences between U.S. banks and their foreign branches that have been so carefully established in federal law and regulation, as well as in the international sphere. Simply stated, the United States banking system and federal safety net provide domestic depositors with a high degree of security but at rates of return that reflect the cost of that security. In contrast, the depositor abroad takes whatever the foreign market offers, including opportunities for higher returns subject to the risks of political and economic instability. In effect, the decision below gives the depositor abroad the best of both: the safety and soundness of the American banking system and the better rates available because of the market conditions and risks prevailing in the foreign market.

By collapsing the distinction between U.S. banks and their foreign branches, the decision of the court of appeals substantially impairs the federal banking policies underlying the distinction. The Sixth Circuit has com-

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[6] *See, e.g.*, Basle Concordat (May 1983), *reprinted in* 22 Int'l Legal Materials 901 (1983) (App. I at 68a); Dale, *The Regulation of International Banking* 171-94 (1984). The Basle Concordat is an agreement of the central bank governors of the "Group of Ten" major industrialized nations (the United States, the United Kingdom, Canada, France, Germany, Italy, the Netherlands, Belgium, Sweden, and Japan) concerning supervision of international banks.

promised the safety and soundness of the U.S. banking system by shifting the risk of foreign governmental interference with foreign deposits from depositors abroad to banks in the United States. As a result, U.S. banks face hundreds of billions of dollars in foreign branch liabilities, thereby exposing the U.S. banking system and the governmental resources supporting that system to potentially massive demands for which no provision has been made.[7] As the government warned in its *amicus* brief below (at 33), allowing foreign governments to impose these liabilities on our banking system will place "unwarranted and unforeseeable strains on the [federal banking] framework."[8]

By imposing significant new risks on U.S. banks the court of appeals' decision also frustrates congressional policy to encourage foreign branch operations. Thus, the U.S. government's *amicus* brief in the companion case (at 34) explained that if foreign governments are permitted to seize or immobilize the assets, but not the liabilities, of foreign branches, U.S. banks will face a "double loss": "a first time when the assets of foreign

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[7] As noted above, deposits with the foreign branches of U.S. banks total some $225 billion. *See* Department of Treasury, *National Treatment Study: Report to Congress on Foreign Government Treatment of U.S. Commercial Banking and Securities Organizations (1986) Update*) at 20; Brief for the United States as Amicus Curiae at 2, *Wells Fargo, supra.* Substantial amounts of this figure reflect deposits in areas where the risk of economic or political instability is not insignificant. For example, U.S. banks are estimated to owe some $3 billion in Panama, while Citibank branches alone owe over $300 million in foreign currency-denominated obligations in the Philippines.

[8] The government went on to explain that decisions such as that below "could lead a bank with heavy losses to request financial assistance from the credit facilities of the Federal Reserve System as 'lender of last resort,' [and] . . . could conceivably lead . . . to calls on the insurance fund of the FDIC, thus increasing the costs to the FDIC in the event of a bank failure." Brief for the United States as Amicus Curiae at 34, *Trinh, supra.*

branches are expropriated; and a second time when the claims of foreign depositors against the home office are upheld." These risks will inevitably serve as powerful disincentives for U.S. banks to establish or continue to maintain foreign branches wherever instability may arise.[9]

In sum, the court of appeals' decision imports the effects of sovereign interference from foreign countries and imposes them on United States banks and the United States banking system. That result is a serious distortion of the federal regulatory scheme, a windfall for foreign depositors and their foreign governments, and an inequitable imposition of double liability on U.S. banks. Fortunately, such untoward consequences need not be countenanced. For, as we now show, federal law and policy require a uniform federal rule that U.S. banks are not liable for the risk of foreign sovereign actions preventing or restricting payment of foreign deposits.

### B. A Uniform Federal Rule of Decision Governing the Liability of United States Banks to Foreign Branch Depositors Is Necessary To Fulfill Federal Banking Policies.

A uniform rule of federal law is necessary here in order to effectuate the foregoing federal policies and to provide a national standard governing the liability of U.S. banks to depositors in their foreign branches. Whether that rule is found in pre-emptive federal statutes and regulations,[10] or whether it is a matter of fed-

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[9] *See* Brief for the United States as Amicus Curiae at 2, 11, 20, *Wells Fargo*, *supra* (emphasizing magnitude of disincentives to foreign branch operations).

[10] *See* 12 U.S.C. § 461(b)(6) (1982) and 35 Fed. Reg. 2768 (1970), discussed at pp. 7-8 *supra*. Because federal statutes and regulations establish the principle that U.S. banks are not responsible for the actions of foreign sovereigns, the court of appeals' decision reaching a contrary conclusion "stands as an obstacle to the

eral common law necessary to further federal policies and promote uniformity, the question of U.S. bank liability must be subject to a federal rule of decision that displaces inconsistent state or foreign law.

There can be no doubt about the "need and authority" in this case for federal courts to fashion such a rule as a matter of federal common law. *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981). Just last Term, in *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510, 2514 (1988), this Court reiterated that federal common law is appropriate in areas involving "uniquely federal interests." Where "a 'significant conflict' exists between an identifiable 'federal policy or interest and the [operation] of state law' " (*id.* at 2515), the federal policy must prevail.

Moreover, the Court has held that federal common law displaces state law rules where "a uniform national rule is necessary to further the interests of the Federal Government . . . ." *Miree v. DeKalb County*, 433 U.S. 25, 29 (1977). *See United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979). Where "there is an overriding federal interest in the need for a uniform rule of decision," this Court repeatedly has fashioned a single federal standard. *Illinois v. City of Milwaukee*, 406 U.S. 91, 105 n.6 (1972). *See Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67 (1943).

1. *Protecting federal interests.* Congress and the Federal Reserve Board have expressed powerful federal policies governing the relation of foreign branches to the domestic banking system. These statutory and regulatory provisions reflect the constitutional authority of the United States over foreign commerce and foreign affairs,

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accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *see also Schneidewind v. ANR Pipeline Co.*, 108 S. Ct. 1145, 1150-51 (1988).

as well as over our federal banking system.[11] Federal law and policy plainly require that U.S. banks and the U.S. banking system not be made to answer when foreign sovereigns take actions preventing or restricting the ability of foreign branches to repay deposits made by depositors in that banking system.[12]

Both Citibank and the United States government explicitly called these important federal interests to the court of appeals' attention. The court below, however, ignored those interests and decided the case based on its own determination of "which . . . part[y] is to suffer the loss." App. at 17a. For the reasons discussed in detail above (at 10-12), that decision, "significantly conflicts" with vital federal policies. *Boyle*, 108 S. Ct. at 2515.

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[11] *See, e.g., Boyle*, 108 S. Ct. at 2516 n.4 (there is a "distinctive federal interest in . . . 'the exterior relation of this whole nation with other nations and governments' "); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 (1979) ("[f]oreign commerce is preeminently a matter of national concern").

This Court has recognized that similar considerations of federal responsibility and national uniformity require the application of federal common law in related areas such as the act of state doctrine. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). Courts of appeals have held that federal common law governs the situs of a debt for purposes of determining the legal consequences of a foreign sovereign's acts. *See Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1122 (5th Cir. 1985); *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*, 392 F.2d 706, 715 (5th Cir.), *cert. denied*, 393 U.S. 924 (1968); *Republic of Iraq v. First Nat'l City Bank*, 353 F.2d 47, 50-51 (2d Cir. 1965) (Friendly, J.), *cert. denied*, 382 U.S. 1027 (1966).

[12] The decision below conflicts with federal policy for another reason as well. The court of appeals held that Citibank was liable to respondent because it closed its Saigon branch—and as a result caused the debt to "spring back" to the United States—just before revolutionary Vietnamese forces confiscated the branch's assets. App. at 15a, 16a. Accordingly, as the United States noted in its *amicus* brief below (at 23), the court's ruling "has the illogical and dangerous effect of encouraging an American bank to keep a foreign branch open, despite great risk to its employees, until the branch is physically seized by enemy soldiers."

The conclusion that federal common law supplies the rule of decision is buttressed by 12 U.S.C. § 632 (1982), which provides that suits involving federally chartered banks and relating to foreign banking "shall be deemed to arise under the laws of the United States, and the district courts of the United States shall have original jurisdiction of all such suits." As the Court has observed, a provision such as this can be "a proper basis for the development of judge-made rules." [13]

2. *National uniformity.* The liability of U.S. banks for foreign sovereign interference with foreign branch deposits must be subject to a uniform national rule. Both banks and federal banking regulators need predictability and consistency in the governing legal principles. It would be intolerable if the liability of U.S. banks for foreign sovereign acts were to vary according to the vagaries of local laws in 50 states and dozens of foreign countries—laws that often cannot be reliably determined until the foreign sovereign has acted and an adjudication actually rendered.

Left to apply principles of ordinary contract and banking law, the state and lower federal courts are incapable of developing a uniform rule. They have adopted a wide range of inconsistent analytical approaches and, more importantly, conflicting and confusing legal standards concerning who should be held responsible for

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[13] *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 96 (1981). *See Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957); *D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.*, 315 U.S. 447, 467-68 (1942) (Jackson, J., concurring) ("[t]hat this ['arising under'] provision is not merely jurisdictional is suggested by the presence in the same section of the Act of the separate provision [establishing federal court jurisdiction]"). *But see Edelmann v. Chase Manhattan Bank, N.A.*, 856 F.2d 322, 325-26 n.14 (1st Cir. 1988), in which the court of appeals, ignoring the plain language of the statute, refused to read Section 632 to support the development of substantive federal common law rules.

foreign sovereign interference. The confusion in the lower courts stems in part from their uncertainty over the source of the law to be applied. Some courts have applied the law of the state where the U.S. bank is headquartered.[14] Others have applied the law of the foreign country where the deposit was taken.[15] One court has split the difference, applying the law of the forum state to determine the basic deposit obligation and foreign law to resolve the U.S. bank's affirmative defense of impossibility of performance.[16] And yet another court has applied federal law, but only in the form of the act of state doctrine, to determine the U.S. bank's liability for foreign branch deposits where a foreign sovereign seized the branch and its assets.[17]

The state and lower federal courts also are divided over the substance of the governing law. Thus, a number of courts (including the court below) have invoked the "general banking principle" (App. at 9a) imputing liability to the bank for the obligations of its branches because they are not separate corporate entities.[18] Other

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[14] *Edelmann v. Chase Manhattan Bank, N.A.*, 856 F.2d 322 (1st Cir. 1988); *Sokoloff v. National City Bank*, 239 N.Y. 158, 145 N.E. 917 (1924), *on remand*, 130 Misc. 66, 224 N.Y.S. 102 (Sup. Ct. 1927), *aff'd without opinion*, 223 A.D. 754, 227 N.Y.S. 907, *aff'd*, 250 N.Y. 69, 164 N.E. 745 (1928).

[15] App. at 10a; *Trujillo-M v. Bank of Nova Scotia*, 51 Misc.2d 689, 273 N.Y.S.2d 700 (Sup. Ct. 1966), *aff'd without opinion*, 29 A.D.2d 847, 289 N.Y.S.2d 398, *cert. denied*, 393 U.S. 982 (1968); *Dougherty v. National City Bank*, 157 Misc. 849, 285 N.Y.S. 491 (Sup. Ct. 1935).

[16] *Vishipco Line v. Chase Manhattan, N.A.*, 660 F.2d 854 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982).

[17] *Perez v. Chase Manhattan Bank, N.A.*, 61 N.Y.2d 460, 463 N.E.2d 5, 474 N.Y.S.2d 689, *cert. denied*, 469 U.S. 966 (1984). *See also Garcia v. Chase Manhattan Bank, N.A.*, 735 F.2d 645 (2d Cir. 1984) (federal act of state doctrine inapplicable).

[18] *Vishipco Line v. Chase Manhattan Bank, N.A.*, 660 F.2d 854 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982); *Sokoloff v. Na-*

courts have emphasized the separateness of bank branches from the home office, concluding that the U.S. bank is not to be held liable for foreign branch deposits seized by a foreign government.[19] But even those courts that accept the foreign branch as a "separate entity" have developed conflicting standards on whether the parties by agreement have changed the "situs" of the deposit obligation and thereby altered the general rule requiring payment only by the branch.[20]

This disarray among the state and lower federal courts on the relationship of foreign branches to the U.S. banking system demonstrates the compelling need for a uniform federal rule. Indeed, given the powerful federal interests at stake and the utter lack of uniformity, it should come as no surprise that the United States, in its *amicus curiae* brief in the related *Wells Fargo* case, recognized the applicability of federal common law to the issue of home office liability. As the government explained, cases such as this

> implicate the application of federal banking law to issues affecting this country's relationships with other members of the international banking community. In these instances, our federal system may require application of federal common law rules . . .

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*tional City Bank*, 239 N.Y. 158, 145 N.E. 917 (1924), *on remand*, 130 Misc. 66, 224 N.Y.S. 102 (Sup. Ct. 1927), *aff'd without opinion*, 223 A.D. 754, 227 N.Y.S. 907, *aff'd*, 250 N.Y. 69, 164 N.E. 745 (1928).

[19] *Dougherty v. National City Bank*, 157 Misc. 849, 285 N.Y.S. at 502-03. *See also Clare & Co. v. Dresdner Bank*, [1915] 2 K.B. 576, 577-78.

[20] *Compare Edelmann v. Chase Manhattan Bank, N.A.*, 856 F.2d at 326-33; *Wells Fargo Asia Ltd. v. Citibank, N.A.*, 852 F.2d at 660-61; *and Garcia v. Chase Manhattan Bank, N.A.*, 735 F.2d at 650, *with Trujillo-M v. Bank of Nova Scotia*, 51 Misc.2d 689, 273 N.Y.S.2d at 704-05; *and Perez v. Chase Manhattan Bank, N.A.*, 61 N.Y.2d 460, 463 N.E.2d 5, 474 N.Y.S.2d at 692-93.

> [citing federal common law decisions in *Texas Industries, Inc., v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); and *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943)].
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> * * * *
>
> We therefore urge that, as a matter of U.S. law and policy, a depositor making a deposit at a foreign branch—and in the absence of an explicit guarantee by the head office—must assume the sovereign risk that the foreign country will restrict repayment.[21]

In short, the problem presented in this case can only be addressed satisfactorily by a federal common law rule. Consistent with federal law and policy, this rule should provide that a U.S. bank, unless it has expressly agreed otherwise, may not be held liable for deposits made with its branch in a foreign country when the foreign government prevents the branch from repaying such deposits.

### C. The Issue of United States Bank Liability to Foreign Branch Depositors Presents an Important and Recurring Question of Federal Law that Warrants this Court's Review.

As discussed above, and as the government explained in its *amicus curiae* brief in the court of appeals, the decision below has dangerous implications for U.S. banks and the U.S. banking system. The court of appeals' ruling will impair the competitiveness of American banks in foreign markets and discourage the operation of foreign branches in many countries of the world. What is more, the ruling creates severe and unanticipated risks for the U.S. banking system and government resources that provide a federal safety net.

Given the magnitude of foreign branch deposits, these increased risks are a matter of the utmost public impor-

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[21] Brief for the United States as Amicus Curiae at 11-12 n.7, 22, *Wells Fargo, supra*.

tance. Unfortunately, foreign governments do expropriate or impose payment restrictions that affect deposits with foreign branches of U.S. banks. Recent events in Vietnam, Panama, and the Philippines attest that foreign interference is today a substantial and recurring concern for American banks doing business abroad. The economic plight of heavily indebted countries and political instability throughout the world increase the likelihood of additional interference.

Experience has demonstrated that the lower courts are incapable of adopting a consistent approach to the issue of home office liability, let alone one that protects federal banking policies. A decision by this Court announcing a uniform federal rule is necessary to resolve the issue and provide clarity for bank management and federal regulators.

The threat to federal banking policy posed by the court of appeals' decision is not diminished by the court's suggestion that U.S. banks could "seek to limit by contract the extent of their exposure to . . . liability." App. at 12a. To begin with, this proposal, even if workable prospectively, cannot provide a solution for the more than $200 billion in foreign deposits that currently are outstanding. Nor is it workable prospectively. As the *Wells Fargo* case demonstrates, there are thousands of international banking transactions each day where market conventions do not permit the bank to use individualized contract language. And even where contract language could be inserted, the court of appeals' suggestion ignores both the hostility that courts have shown to exculpatory provisions in bank deposit agreements and the confused state of the law. For example, the court below, while suggesting that some exculpatory clauses might be effective, nevertheless construed the explicit *force majeure* clause in this case not to apply (ostensibly because Citibank "voluntarily" closed its branch in the face of an imminent invasion by a communist army). In contrast,

the Second Circuit stated in *Vishipco* that the enforceability of any form of exculpatory clause would be "problematic" for U.S. banks operating through foreign branches. *Vishipco*, 660 F.2d at 863. Given this confusion, only a uniform rule of federal law can provide reliable guidance for regulators and the parties.

Nor is the court of appeals' implicit suggestion (App. at 13a) that American banks should operate abroad through subsidiaries rather than branches realistic. Although federal statutes authorize U.S. banks to own foreign bank subsidiaries, federal policy has always favored the use of branches and contemplated the establishment of subsidiaries only where branches would not be feasible.[22] In any event, many foreign governments—including Vietnam in the present case—require United States banks to operate through local branches and do not permit local bank subsidiaries to be wholly owned by foreign banks. App. at 2a.

Thus, notwithstanding the court of appeals' attempts to minimize the practical significance of its ruling, it is clear that the decision below will cause significant harm to U.S. banks and U.S. regulatory interests. The Solicitor General, appearing *amicus curiae* at the Court's invitation in *Vishipco*, agreed that the issue is one of substantial public importance that:

- "has significant practical implications" and "implicates the interests of federal regulatory agencies responsible for oversight of the American banking industry" (U.S. Am. Br. at 7-8);
- "has significant implications for the Board of Governors of the Federal Reserve System . . . and for the Federal Deposit Insurance Corporation" (*id.* at 8); and

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[22] *See* H.R. Rep. No. 408, 66th Cong., 1st Sess. 1 (1919); H.R. Rep. No. 447, 64th Cong., 1st Sess. 2 (1916).

- "raises serious concerns about the protection of American citizens and investment overseas" (*id.* at 9).

The Sixth Circuit's decision in this case presents these federal concerns.[23] The issue is now ripe for decision. Its overriding importance and the continuing failure of the lower courts adequately to resolve the issue are compelling indications of the need for the Court to grant this petition.

## CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

ROBERT H. BORK
5171 Palisade Lane, N.W.
Washington, D.C. 20016

ARNOLD M. LERMAN *
JAMES S. CAMPBELL
DAVID WESTIN
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000

KENNETH S. GELLER
MARK I. LEVY
MAYER, BROWN & PLATT
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006

*Counsel for Petitioner*

* Counsel of Record

December 20, 1988

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[23] Although the Court denied certiorari in *Vishipco*, the sole question presented in that case related to the act of state doctrine, which the Solicitor General concluded was not implicated by the lower court's decision. Brief for the United States as Amicus Curiae at 7, *Vishipco*, *supra*. *See* Brief for the United States as Amicus Curiae at 8, *Trinh*, *supra* (distinguishing posture of present case from that of *Vishipco*).

# APPENDICES

**APPENDIX A**

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

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No. 86-1258

NGOC QUANG TRINH

versus

CITIBANK, N.A.

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July 8, 1988

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John E. Jacobs (Lead Counsel), Mason, Steinhart & Jacobs, P.C., Southfield, Mich., John E. Hoffman, Sherman & Sterling, New York, N.Y., for defendant-appellant.

Lawrence John, Detroit, Mich., for plaintiff-appellee.

Anthony J. Steinmeyer (Lead), Marc Richman, Appellate Staff, Civ. Div., Dept. of Justice, Washington, D.C., James M. Spears, for amicus curiae, United States.

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Appeal from the United States District Court
for the Eastern District of Michigan

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Before KEITH and JONES, Circuit Judges, and BROWN, Senior Circuit Judge.

NATHANIEL R. JONES, Circuit Judge:

*Introduction*

Defendant-appellant Citibank, N.A. ("Citibank") appeals from a judgment holding it liable to plaintiff-appellee Ngoc Quang Trinh ("Trinh") for payment on Trinh's savings account in Citibank's former branch bank in Saigon, South Vietnam. The district court, relying primarily on *Vishipco Line v. Chase Manhattan Bank*, 660 F.2d 854 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982), concluded that the home office of the Saigon branch of Citibank was liable on deposits placed in the foreign branch when the branch was forced to close in 1975 as a result of the impending overthrow of Saigon by revolutionary forces. *Trinh v. Citibank*, 623 F. Supp. 1526 (E.D. Mich. 1985). In effect, the lower court placed the risk of loss arising from a political revolution on the domestic home office of the American bank rather than on the individual depositors. Because we agree that this is precisely where the risk of loss belongs—and because neither the deposit agreement construed in light of the Vietnamese law of *force majeure* nor the affirmative defense asserted by Citibank convinces us otherwise—we affirm the judgment of the district court.

I.

Citibank is an international banking corporation based in New York with branch offices all over the world. Prior to 1975, it operated a branch in Saigon, South Vietnam known as Citibank Saigon. Under Vietnamese law, Citibank could not have operated in Vietnam through a separate corporation or subsidiary; Citibank was limited to operating as a branch. Moreover, Vietnamese law required that a branch maintain all of its assets in the local currency and keep all the branch's capital, assets, funds, books and records separate and apart from those of the home office. Vietnamese law also required that branch banks have a paid-in capital reserve equal to a certain percentage of its customer's deposits and that this

capital be earmarked and transferred to the branch *by the home office.*[1]

On July 25, 1974, plaintiff's father, Quang Quy Trinh, a retired senator in the South Vietnamese government, opened a joint savings account at Citibank Saigon in his name and that of his son. The account paid annual interest at a rate of 19% compounded daily. At the time Trinh's father opened the account, Trinh was a student residing in Michigan. He became a United States citizen in 1979 and has never returned to Vietnam.

The deposit agreement governing the account provided that "withdrawals [would] be permitted only at Citibank's place of business"—which was designated as "28-30 Nguyen Van Thinh, Saigon 1, Republic of Vietnam"—and that deposits were payable only in Vietnamese piasters. The agreement further provided as follows:

> Citibank does not accept responsibility for any loss or damage suffered or incurred by any depositor resulting from government orders, laws . . . or from any other cause beyond its control.

J. App. at 126.

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[1] Article 26 of Decree Law 18 provides as follows:

> The Vietnam branch of a foreign bank—. . . the headoffice [of the foreign bank] must clearly earmark and transfer to the branch in Vietnam a capital commensurate with the conditions stipulated in articles 12 & 13 of this Decree Law.

J. App. at 136 (brackets in original). Articles 12 and 13 state in pertinent part:

> *Article 12.* Each bank in Vietnam shall have a fully paid-in capital the minimum amount of which shall be determined for each type of bank by the Administrative Council of the National Bank . . . .
>
> *Article 13* . . . 1) The total of the capital already paid-in, the reserve amount and the undistributed profits of each bank shall always be maintained at a minimum percentage of the amount of deposits of its customers. . . .

J. App. at 134.

In early April 1975, the situation in Saigon was becoming desperate as the North Vietnamese forces closed in on the city. During this period, American embassy officials met often with the branch officers of the American banks in Saigon to consider what actions should be taken to protect the safety of employees, both American and Vietnamese. These meetings produced a contingency plan for emergency evacuation. During this time, the branch bank encouraged concerned depositors to withdraw their money, although the situation did not safely allow for the posting of formal notices suggesting such withdrawals.

On April 24, 1975, on the eve of Saigon's fall to the North Vietnamese, Citibank closed its Saigon branch, and its personnel left the city in conjunction with the general evacuation of American citizens and Vietnamese employees planned by the United States Embassy. All of the branch's documents, files, records, and books were left in the branch. Cash from the branch, as well as the branch's keys, vault combination, and official documents, were entrusted to embassy officials with a request to turn them over to the National Bank of Vietnam, South Vietnam's central banking authority.

The following day, on April 25, 1975, the South Vietnamese government issued a joint communique stating that Citibank, and two other American banks, had "closed temporarily without asking for permission"; that these banks would be sanctioned; and that the National Bank and the Finance Ministry guaranteed to return all the money legally deposited.

Less than one week later, on April 30, 1975, the South Vietnamese government in Saigon fell. On May 1, 1975, the new revolutionary administration of Vietnam declared victory and confiscated all banks. Thus, all Saigon banks, including Citibank's branch, were "placed under

the management of the Saigon-Gio Dinh Military Management Committee banking committee," and their operations suspended. The National Bank of Vietnam, the central bank, reopened under North Vietnamese control, and over the course of several weeks made a number of announcements concerning its plans for the future. Specifically, the central bank announced:

> The Vietnam National Bank . . . is ready to recover former debts incurred by banks through lending and to conduct settlement of debts, deposits, savings and all other sources of capital in the economy.

J. App. at 152. It was further announced that:

> [T]he national bank guarantees that the savings accounts of workers, who legitimately earn their income through their own efforts and labor, will gradually be paid to them. . . .
>
> . . . .
>
> As regards banks whose owners have fled the country, the national bank will inventory and re-evaluate their assets and settle their accounts in order to determine their ability to return the savings of account holders. . . .

*Id.* at 156-57.

Shortly after the fall of Saigon, plaintiff's father was placed in a reeducation camp. After his release in 1980, he sent the Citibank Saigon passbook to his son in Michigan. In May 1980, Trinh called the International Division of Citibank in New York to inquire about the deposit. Trinh was told that the National Bank of Vietnam was now responsible for the deposit. On November 5, 1980, Trinh wrote to Walter Wriston, Chairman of Citibank, expressing dissatisfaction with this reply, and was again told that the National Bank was responsible for the deposit. This lawsuit was commenced in the Eastern District of Michigan on June 14, 1984.

Applying Vietnamese law, the district court found in favor of Trinh. *Trinh v. Citibank*, 623 F. Supp. 1526 (E.D. Mich. 1985). As mentioned, the court relied primarily on Judge Mansfield's opinion in *Vishipco*, where on similar facts, the Second Circuit found the Chase Manhattan Bank liable to depositors in its former Saigon branch. In this respect, the court concluded that the deposit agreement with Trinh formed an underlying basis for recovery against the bank and that, as in *Vishipco*, the Vietnamese law of *force majeure* did not relieve Citibank of its liability on that deposit. 623 F. Supp. at 1532. Although the court recognized that in *Vishipco* the underlying obligation had been construed under New York law, as opposed to Vietnamese law, the court did not find this distinction to be significant. *Id.* In the first place, the court noted that Citibank never argued that, under Vietnamese law, Trinh's deposits did not equal a debt of the bank or form an underlying basis for recovery. Moreover, since the *Vishipco* court *did* apply Vietnamese law to the argument that *force majeure* relieved the bank of liability—the same argument that Citibank makes here—the fact that it addressed this argument as an affirmative defense to liability (rather than as a threshold basis for denying recovery on the underlying obligation) was not, the court believed, the basis for a meaningful distinction. *Id.*

The court then stated that, even if it accepted Citibank's proposition that the doctrine of *force majeure* was incorporated into the bank's underlying obligation on the deposits, the application of that doctrine to these facts would nevertheless not relieve Citibank of liability. *Id.* at 1533. Specifically, the court reasoned that Citibank's decision to close its Saigon branch was a matter of "voluntary choice," not an act of God, act of government, or "fortuitous cause beyond its control," as required by Vietnamese law. *Id.* at 1533-34.

Further, the court rejected Citibank's argument that Citibank Saigon had been nationalized by the revolutionary government and that the National Bank of Vietnam was its successor in interest. *Id.* at 1534. The court concluded that the argument failed for two reasons. First, the court found that the *situs* of the deposit was no longer Vietnam at the time the expropriation took place because it had "spr[ung] back" to the head office of Citibank when Citibank Saigon was voluntarily closed. *Id.* at 1536. Second, the court found that Citibank had failed to prove that the Vietnamese government had clearly assumed the liabilities as well as the assets of Citibank Saigon. *Id.* at 1534-35. Accordingly, the district court ordered Citibank to pay Trinh the dollar value of his account, $1403.67, plus prejudgment interest of $1792.69, for a total of $3196.36.

II.

A.

Citibank's primary argument on appeal is that the deposit agreement construed under Vietnamese law [2] places the risk of loss for a political revolution on the depositor not on the domestic home office. In this respect, the bank points to the express terms of the agreement, signed by Trinh's father, which provides both that "Citibank does not accept responsibility for any loss or damage suffered or incurred by any depositor resulting from government orders, laws . . . or from any other cause beyond its con-

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[2] We agree with the district court that the law of Vietnam applies to this case. Generally, as the lower court explained, a court must apply the law of the forum with the most significant contacts with the case, the law where the contract was made, or the law where the branch was located. *See, e.g., Zimmerman v. Sutherland*, 274 U.S. 253 (1927); *Aaron Ferer & Sons, Ltd. v. Chase Manhattan Bank*, 731 F.2d 112 (2d Cir. 1984). Here, all of the indicators point to a conclusion that Vietnamese law applies. Plaintiff's citizenship was Vietnamese, and his father, Citibank Saigon, the banking relationship, the banking transactions, and the account currency were all located in Vietnam.

trol," and that payment on accounts would be made only in Vietnam and only in piasters. In the bank's view, these provisions of the agreement create an implicit distinction between *credit* risk and *sovereign* risk, with the bank bearing only the former. Thus, where a branch is unable to pay its depositors as a result of, for instance, financial mismanagement, robbery, or insolvency—the typical kinds of economic or credit risks normally assumed by companies doing business internationally—Citibank concedes that the home office would be liable for the deposits because, in such circumstances, payment could nevertheless be made in Vietnam and in piasters. However, where, as here, revolutionary conditions make payment in Vietnam in piasters impossible, Citibank believes that, under the deposit agreement, the depositor, not the domestic home office, must bear the loss.

The bank argues that its intention to create an implicit distinction between credit risk and sovereign risk is suggested, not only by the plain terms of the agreement, but also by a construction of those terms in light of applicable Vietnamese commercial law. More specifically, the bank argues that it should be presumed that the parties intended for their agreement to be consistent with the Vietnamese law of *force majeure*,[3] which, according to the testimony of the bank's Vietnamese law expert, placed the risk of loss on the depositor in the unique circumstances presented here.

For these reasons, Citibank contends that the only reasonable expectation of depositors was to receive piasters at Citibank Saigon. In the bank's view, by allowing the

[3] Article 701 of the Vietnamese Commercial Code (V.C.C.) provided: "The debtor does not have to pay damages if his violation or non-performance of contractual obligations is due to a fortuitous cause or case of *force majeure*."

Article 1206 of the V.C.C. provided: "The depositary is not liable for accidents or risks resulting from *force majeure*, unless previously he had been given notice to return the deposited objects."

plaintiff to recover, the district court effectively re-wrote key provisions of the deposit agreement and, further, gave the depositor something he could not have gotten—and could not have expected to get—under that agreement construed in light of Vietnamese law: United States dollars in the United States at a rate of interest (19%) which would have been illegal for Citibank to pay under U.S. law.

We are not persuaded by the bank's arguments. In the first place, as the district court correctly recognized, it is a general banking principle that the home office is *ultimately liable* on a deposit placed in its foreign branch if, as here, the branch closes or otherwise wrongfully refuses to return a deposit. *Sokoloff v. National City Bank*, 130 Misc. 66, 73, 224 N.Y.S. 102, 114 (N.Y. Sup. Ct. 1927); *see also Bluebird Undergarment Corp. v. Gomez*, 139 Misc. 742, 249 N.Y.S. 319 (City Ct. N.Y. 1931); Heininger, *Liability of U.S. Banks for Deposits Placed in Their Foreign Branches*, 11 Law & Pol. Int'l Bus. 903, 926 (1979). This well-established general principle of ultimate liability is not inconsistent with Citibank's assertion that a branch bank is a separate and distinct business entity. *See* Brief of Citibank at 30-32. To this end, the bank is surely correct in arguing that absent special circumstances, deposits made in branch banks are payable only there. *Id.* (citing *Bluebird Undergarment Corp. v. Gomez*, 139 Misc. 742, 249 N.Y.S. 319 (City Ct. N.Y. 1931)). However, as we read *Sokoloff*, *Bluebird* and similar cases, one of the "special circumstances" triggering liability against the home office *is* the *closing of a branch*. *Bluebird*, 249 N.Y.S. at 321-22. Thus, while it is true that the payment obligation exists *primarily* between the branch bank and the depositor, the *ultimate* obligation on the deposits remains with the home office. *Id.*; *Vishipco*, 660 F.2d at 863; *see also* Annotation, *Branch Banks*, 136 A.L.R. 471, 493-97 (1942).

That the home office of the branch was to be ultimately liable for the deposits of its foreign customers is further suggested, we think, by the Vietnamese laws under which foreign banks operated. These laws permitted foreign banks to operate only through branches, and required the home office of a branch to "clearly earmark *and transfer to the branch* in Vietnam" an amount of capital equal to a certain percentage of the branch's deposits. *See supra* at note 1. The home office was required to maintain this paid-in reserve amount at its proper level, and so as deposits increased, transfers to the branch would increase as well. In our view, by prohibiting foreign banks from operating through locally incorporated subsidiaries, and by requiring parent banks to maintain paid-in capital reserves at their Vietnamese branches. Vietnamese law sought to remove any ambiguity as to where the responsibility would ultimately lie for the liabilities of branch banks. In this respect, South Vietnam furthered its national policy, as recognized by the court in *Vishipco*, of enabling "those depositing in foreign branches to gain more protection than they would have received had their money been deposited in locally incorporated subsidiaries of foreign banks." *Vishipco*, 660 F.2d at 863.

While not denying that in some circumstances the home office would be ultimately liable for deposits placed in its foreign branch, Citibank argues that in this case the deposit agreement construed under Vietnamese law limits the home office's ultimate liability to only those situations in which the branch's failure to pay is the result of *credit*, as opposed to sovereign, risks. More specifically, as outlined above, Citibank concedes that the home office would be liable under the deposit agreement if the branch's failure to pay was the result of insolvency, financial mismanagement, or any other circumstance in which payment could still be made in Vietnam and in piasters. The bank maintains, however, that it is not

liable under the agreement where, as here, political events have made payment in Vietnam in piasters impossible. We are not persuaded that such a distinction is evident here or that one is required by application of the Vietnamese law of *force majeure*.

By operating a branch office in Vietnam, Citibank indicated to its foreign depositors that it accepted the risk that, in at least some circumstances, it would be liable elsewhere for obligations incurred by its branch. *Vishipco*, 660 F.2d at 863. In so doing, it "reassure[d] [those] depositors that their deposits [would] be safer with them than they would be in a locally incorporated bank." *Id.* (citing Heininger, *supra*, at 911-12). With the volatile situation in Vietnam in the early 1970's, this assurance of safety was undoubtedly one of the primary factors motivating Vietnamese depositors, like Trinh, to place their money in Citibank.[4] Certainly, these depositors expected that Citibank, with its worldwide assets and international reputation, would be "good" for the deposits if, for *whatever reason*—whether it be financial mismanagement, insolvency, or political events—Citibank Saigon could not return them. In our view, the deposit agreement did not dispel these expectations. That is, while we recognize that the deposit agreement absolved the *branch office* of responsibility for losses resulting from government orders and "any other cause beyond its control," we do not find in that agreement *any* indication that the depositor could not proceed against the home office if the branch has failed to pay.

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[4] That Trinh relied on this safety factor is evidenced by an English translation of the agreement he signed when the account was originally opened on July 25, 1974. The agreement contains a section where the depositor is asked to indicate, by checking the relevant box, his reason for opening an account with Citibank. Trinh's reason for banking at Citibank was: "My money is safer with Citibank." *See* J. App. at 130-31.

Consistent with this, we reject Citibank's argument that the provision of the agreement limiting payment on deposits to Vietnam and to Vietnamese piasters was sufficient to inform depositors that they were to bear the risk of loss, and would have no recourse against the home office, if Citibank Saigon was forced to close due to revolutionary conditions. As we have emphasized, such an allocation of risk is contrary to the depositor's expectations that the bank, by operating through a branch, has consented to be liable elsewhere for the branch's obligation in the event the branch does not meet them. Banks certainly can, and will, seek to limit by contract the extent of their exposure to such liability; however, to be effective, such limitation provisions must be explicit and must clearly and unmistakably inform depositors that they have no right to proceed against the home office. The provision here, specifying the place where the branch will make payment and the currency it will use, is insufficient under this standard. In our view, a person who had signed a deposit agreement containing such a provision would not have been aware that he had given up his right to proceed against the home office in the event the branch was no longer in existence and could not pay its depositors.

We do not believe that the Vietnamese law of *force majeure*, applied to the deposit agreement, requires us to reach a contrary conclusion. *Force majeure* is a French term used to describe acts of God, acts of government, and any other fortuitous cause beyond the control of the parties in the contract. The doctrine was codified in section 1206 of the Vietnamese Commercial Code, which provided that the "depositary is not liable for accidents or risks resulting from *force majeure*, unless previously he has been given notice to return the deposited object." *See supra* note 3. Citibank's expert on Vietnamese law, Mr. Ta Van Tai, testified that in his opinion the takeover of the bank and the abolition of the piaster by the Viet-

cong was an act of government beyond the control of the bank. In his view, since Trinh did not previously request return of his deposits, Trinh must suffer the loss.

While we do not deny that the closing of a bank by revolutionary forces is the type of fortuitous cause contemplated by the law of *force majeure*, we do not agree that, where a parent branch relationship is involved, application of that doctrine requires the conclusion that the depositor is to bear the risk of loss. As recognized by both the lower court here and the Second Circuit in *Vishipco*, impossibility of performance in Vietnam did not relieve Citibank of its obligation to perform elsewhere. *Vishipco*, 660 F.2d at 863-64. Citibank had accepted the risk of such an obligation by operating a branch in Vietnam. Since its Vietnamese depositors did not waive their right to proceed against the home office, Citibank cannot be heard to argue that the inability of its Saigon branch to perform relieves the home office of liability for the bank's debts incurred in Saigon. In our view, Citibank, as an ongoing business entity, was able in April 1975, and remains able to this day, to discharge those debts either in New York or at a variety of other points outside of Vietnam.

For the above reasons, we are in agreement with the lower court that the deposit agreement construed under Vietnamese law does not foreclose Trinh from proceeding against Citibank's New York office to recover on the deposits made at Citibank's branch in Saigon. Accordingly, unless it is relieved of liability by some affirmative defense, Citibank is liable to Trinh for the amount deposited.

B.

Citibank argues, as a defense to liability, that the National Bank of Vietnam expressly assumed Citibank Saigon's assets *and* liabilities, thereby becoming liable on Trinh's account as Citibank Saigon's successor in interest.

Citibank argues that this assumption of Citibank Saigon's obligations was undertaken as early as April 25, 1975, when the National Bank of Vietnam, still operating under South Vietnamese rule, guaranteed to return all money legally deposited in the recently-evacuated U.S. branch banks. Citibank further argues that when the Vietcong overran Saigon less than a week later, the new government confirmed, rather than denied, this assumption of assets and liabilities. As evidence of this, Citibank points to a number of published declarations of the new government, including, most specifically, its declaration that "[a]ll . . . banks . . . will be confiscated and, from now on, managed by the revolutionary administration," J. App. at 148, and its declaration that the newly-reorganized National Bank of Vietnam was "ready to recover former debts incurred by banks through lending and to conduct settlement of debts, deposits, savings and all other sources of capital in the economy." *Id.* at 152. According to Citibank, the confiscation of the banks and the assumption of assets and liabilities were the acts of a sovereign state which, under the act of state doctrine, must be given their intended effect by United States courts.

We agree with the district court that this defense does not relieve Citibank of its obligation on the deposits. As an initial matter, we believe Judge Gilmore was correct in holding that the April 25, 1975 announcement of the South Vietnamese government was not binding on the new regime and was irrelevant to the issue of whether the liabilities of Citibank Saigon had been assumed by the National Bank of Vietnam. In so holding, we are not unmindful that, under basic principles of state succession, a promise of a former state is generally binding on the successor state. *See, e.g., Vilas v. City of Manila*, 220 U.S. 345, 357 (1911) (quoting *Chicago Rock Island & Pacific Ry. Co. v. McGlinn*, 114 U.S. 542, 546 (1885)). However, in these circumstances, where revolutionary forces were closing in on Saigon and the South Vietnamese

government was squarely faced with its own imminent demise—a demise which became a reality only days later —we do not believe that a statement by the South Vietnamese government purporting to accept responsibility for the obligations of the evacuated U.S. branch banks is effective to bind the new regime with regard to those obligations.

Further, and more directly to the point, we are not at all persuaded that, by confiscating the nation's banks, the new government undertook to assume the *liabilities* of foreign banks, like Citibank Saigon, that fled the country in the face of the fall of South Vietnam. As the district court accurately observed, and as evidenced by various statements of the new regime quoted in the court's opinion (623 F. Supp. at 1535), Citibank's proof with regard to the assumption of liabilities of foreign banks was "equivocal at best." For example, in June of 1975, the National Bank issued a communique stating, among other things, that "*all* foreign banks must accept responsibility" for the liquidation of deposits. J. App. at 152. And, a September 7, 1975 newspaper announcement provided as follows:

> As regards banks whose owners have fled the country, the national bank will inventory and re-evaluate *their* assets and settle *their* accounts in order to determine *their ability* to return the savings of account holders; the bank will issue a notice concerning these persons.

*Id.* at 157 (emphasis added). These announcements, and others of similar tone, do *not* as the district court held, "indicate an unqualified assumption of all liabilities" by the new government. Indeed, in our view, the announcements suggest that the new government specifically did *not* intend to assume the liabilities of foreign banks whose "owners fled the country," but instead expected such liability to remain with those banks.

More importantly, the confiscation decree and other decrees of the new government regarding bank deposits would not, in any event, have had any effect on Citibank's debt to Trinh because, as recognized in *Vishipco* and in the court below, the deposits in Citibank Saigon no longer had their "situs" in Vietnam at the time of the decrees.

Generally speaking, an act of state will go unquestioned in United States courts only to the extent that it affects property whose "situs" is within the territorial jurisdiction of the acting state. While this is a relatively simple concept to apply with respect to tangible property, it becomes more difficult with respect to intangible property such as the debts of a bank. As one court has observed: "The situs of intangible property is about as intangible a concept as is known to the law." *Tabacalera Severiano Jorge v. Standard Cigar Co.*, 392 F.2d 706, 714 (5th Cir.), *cert. denied*, 393 U.S. 924 (1968). We think the court in *Vishipco* had it right in concluding that, for purposes of the act of state doctrine, a debt does *not* have its "situs" in the foreign state unless the state has the power to enforce or collect it; a power which, the court explained, is dependent upon jurisdiction over the *debtor*, *Vishipco*, 660 F.2d at 862 (citing *Harris v. Balk*, 198 U.S. 215 (1905)). Since in this case, as in *Vishipco*, the debtor (Citibank) abandoned its Saigon branch at the time of the Vietnamese decrees and no longer had any presence in Vietnam which would remain in existence after its departure, the revolutionary government had no jurisdiction over the debtor. Accordingly, the "situs" of the debts was not in Vietnam and the Vietnamese decrees could have no effect on Citibank's debt to Trinh. *See also* Heininger, *Liability of U.S. Banks*, 11 Law & Pol. Int'l Bus. at 975.[5]

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[5] As Professor Heininger observed:

> The situs of a bank's debt on a deposit is considered to be at the branch where the deposit is carried, but if the branch is closed . . . the depositor has a claim against the home office; thus,

For the above-stated reasons, Citibank's defense to liability fails and, accordingly, it is liable to Trinh on the deposit account.

C.

As a final observation, we believe that the result reached by this opinion is fair and equitable under the circumstances. We are, of course, not unmindful of the fact that both Trinh and Citibank are innocent parties and, to a great extent, victims of circumstances beyond their control. However, as with many disputes involving innocent parties, it is our job as a court to determine which of those parties is to suffer the loss. Here, because we are not persuaded that either the deposit agreement or the Vietnamese law of *force majeure* requires a contrary conclusion, we conclude that the loss is to be borne by the bank.

To this end, we think Judge Mansfield was absolutely right in *Vishipco*, where he observed:

> A bank which accepts deposits at a foreign branch becomes a debtor, not a bailee, with respect to its depositors. In the event that unsettled local conditions require it to cease operations, it should inform its depositors of the date when its branch will close and give them the opportunity to withdraw their deposits or, if conditions prevent such steps, enable them to obtain payment at an alternative location. In the rare event that such measures are either impossible or only partially successful, fairness dic-

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the situs of the debt represented by the deposit would spring back and cling to the home office. If the situs of the debt ceased to be within the territorial jurisdiction of [the confiscating state] from the time the branch was closed, then at the time the confiscatory decree was promulgated, [the confiscating state would] no longer [have] sufficient jurisdiction over it to affect it. . . . [U]nder the act of state doctrine, the courts of the United States are not bound to give effect to foreign acts of state as to property outside the acting state's territorial jurisdiction.

> tates that the parent bank be liable for those deposits which it was unable to return abroad. To hold otherwise would be to undermine the seriousness of its obligations to its depositors and under some circumstances (not necessarily present here) to gain a windfall.

*Vishipco*, 660 F.2d at 864 (citations omitted).

III.

For all of the foregoing reasons, Citibank is liable to Trinh on the deposits made by his father in the Saigon branch of Citibank.

JUDGMENT AFFIRMED.

BAILEY BROWN, Senior Circuit Judge, dissenting.

The majority opinion, as does the opinion of the district court, demonstrates a great deal of heart but will not stand careful legal analysis. For this reason, I respectfully dissent.

As was recognized by the district court, although Trinh, the plaintiff, alleged only diversity jurisdiction (28 U.S.C. § 1332), the court also had federal question jurisdiction because Citibank is a national bank (12 U.S.C. § 632). The district court then, in making its choice of law determination, wrestled with the question whether Michigan or federal common law conflict of laws should be applied and came to the conclusion that, irrespective of which it applied, Vietnam law governed. *Trinh v. Citibank, N.A.*, 623 F. Supp. 1526, 1531 (E.D. Mich. 1985). The parties, on appeal, agree with this determination.

Citibank advanced several theories of defense. The first was that, under the very terms of the contract between the depositor and Citibank at the time the deposits were made, and particularly in the light of the commercial law of Vietnam as to the effect of *force majeure*, Citibank was not liable to Trinh. The second defense was that the failure of Citibank to pay resulted from sovereign risk or *force majeure* rather than credit risk and that, under Vietnam law, sovereign risk was assigned to the depositor. Another defense was that the National Bank of Vietnam claimed the assets and assumed the liabilities of Citibank after Citibank's employees fled the country and before the communists took over. Still another defense was that Citibank was not liable to Trinh because the revolutionary communist government expropriated Citibank's Saigon branch, including the assets. Without intending to deprecate Citibank's other defenses, I believe that its first defense, based upon the terms of

the deposit contract, is a valid one and requires a reversal of the district court's judgment in favor of Trinh.[1]

The pertinent facts are undisputed. Citibank (formerly First National City Bank) is an international banking corporation based in New York which for many years prior to May 1975 operated a branch bank in Saigon, South Vietnam. In order to operate that branch, Citibank had to abide by Vietnamese banking laws, which, *inter alia*, required Citibank to establish a branch rather than a distinct corporate subsidiary, to maintain all the branch's assets in the local currency (piasters), and to keep all the branch's capital, assets, funds, books, and records separate and apart from those of the American home office.

In 1974, Trinh's father, a senator in the South Vietnamese government, opened a joint savings account at Citibank's Saigon branch in his name and that of his son.[2] The account paid an interest rate of 19 percent, compounded daily. The deposit agreement governing the account expressly provided, as required by Vietnamese banking law, that the account was payable solely at the Saigon branch office[3] and solely in piasters. The deposit

[1] Although the district court's opinion states (623 F.Supp. at 1532) that "Citibank, in the present case, has never argued that, under the law of Vietnam, Trinh's deposits do not equal a debt of the bank or form an underlying basis of recovery," it is clear that Citibank did indeed take this position. "Statement of Defendant's Claims and Defenses" in Final Pre-Trial Order, App. at 9. Moreover, the majority opinion properly recognizes that Citibank made this defense and addresses it.

[2] At the time, Trinh was a student residing in Michigan. He never returned to Vietnam and became a United States citizen in 1979.

[3] The deposit agreement provided that "[w]ithdrawals from an account will be permitted only at Citibank's *place of business*." (emphasis added). The deposit agreement specifically designated Citibank's "place of business" as "28-30 Nguyen Van Thinh, Saigon 1, Republic of Vietnam."

agreement also provided explicitly that Citibank's Saigon branch "does not accept responsibility for any loss or damage suffered or incurred by any depositor resulting from government orders, laws, levies, taxes, embargoes, moratoriums, exchange restrictions or from any other cause beyond its control."

In early April 1975, as North Vietnam's military forces approached Saigon, American embassy officials met with the branch bank's officers to consider the future safety of the branch bank's employees, both Vietnamese and American. The meetings produced a contingency plan for an emergency evacuation. During this time, the branch bank encouraged concerned depositors to withdraw their money, but the situation precluded, as the majority opinion recognizes, posting formal notices suggesting such withdrawals.

On April 24, 1975, on the eve of North Vietnam's takeover of Saigon, Citibank closed its Saigon branch and evacuated the branch's personnel in conjunction with the general evacuation coordinated by the American embassy. All of the branch's documents, files, records, and books were left in the building. The branch's keys, vault combination, and official documents list were entrusted to the Embassy's economics attache with a request that he turn them over to the National Bank of Vietnam, South Vietnam's central banking authority. There is no contention that Citibank removed any assets of its Saigon branch.[4]

The next day, on April 25, 1975, the South Vietnamese Finance Ministry and the National Bank of Vietnam issued a joint communique announcing:

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[4] The Citibank branch manager's testimony describing the confusion and fear leading to the escape from South Vietnam of the branch's personnel, including its Vietnamese employees, is a harrowing story. It was necessary for the manager to portray the Vietnamese employees as his personal dependents in order to get them out of the country. These employees surmised that bankers would not be favorably treated by the incoming revolutionary government.

> [T]he Chase Manhattan Bank, the First National City Bank [Citibank] and the Bank of America [have] closed temporarily without asking for permission from our government. . . . The National Bank would like to remind those who have accounts in these banks that the National Bank guarantees to return all the money legally deposited. Reimbursement procedures will be made public in a future communique of the National Bank.

No such "future communique" was ever issued, because several days later North Vietnam's forces overran Saigon and established a new, communist government. On May 1, 1975, the new government declared that "[a]ll . . . banks . . . will be confiscated and, from now on, managed by the revolutionary administration." Eight days thereafter, on May 9, 1975, the new government announced that "[t]he activities of all banks are temporarily suspended until further notice. All banks must be placed under the management of the Saigon-Gia Dinh Military Management Committee banking committee." The National Bank of Vietnam then reopened under communist rule and stated its readiness "to recover former debts incurred by banks through lending and to conduct settlement of debts, deposits, savings and all other sources of capital in the economy." Towards that end, over the next several months the National Bank of Vietnam published, *inter alia*, the following policies:

> With regard to previous deposits, securities and savings, all debtor banks, including all foreign banks, must accept responsibility for their liquidation and the submission of their records to the Vietnam National Bank. After settlement with banks, the Vietnam National Bank will conduct reviews and make known authorization to use deposits in accordance with production and commercial requirements and will pay out savings to workers and people according to new banking regulations.

> [T]he national bank guarantees that the savings accounts of workers, who legitimately earn their income through their own efforts and labor, will gradually be paid to them.
>
> As regards persons wanting to withdraw money on deposit at a bank . . . while awaiting the settlement of accounts with the private banks, the National Bank of Vietnam will study and satisfactorily meet loan requests for reasonable business and production needs.
>
> As regards banks whose owners have fled the country, the national bank will inventory and re-evaluate their assets and settle their accounts in order to determine their ability to return the savings of account holders[.]
>
> As for the comprador bourgeoisie who undertook speculation in wartime by relying on the U.S. Imperialists and colluding with the ringleaders in the puppet armed forces and administration and who fled abroad or still remain in the country, their entire property under state management will be confiscated completely or partly according to the gravity of their crimes.

Shortly after the communist takeover of Saigon, Trinh's father was placed in a "re-education" camp. Five years later, in early 1980, Trinh's father was released, whereupon he notified Trinh of the joint savings account in Citibank's former Saigon branch. Trinh then sought payment on that account at Citibank's office in New York. Citibank refused to pay on the ground that, in its view, the National Bank of Vietnam is now responsible for the account. In response, Trinh brought this suit.

During the bench trial, Trinh's evidence consisted primarily of his own testimony and that of a foreign currency expert. Trinh presented no expert testimony con-

cerning Vietnamese law. Citibank's evidence included the testimony of the customer service representative who opened Trinh's account, the manager who helped evacuate Citibank personnel, a foreign currency expert, and an expert on Vietnamese law.

Applying Vietnamese law, the district court held in favor of Trinh. *Trinh v. Citibank, N.A.*, 623 F. Supp. 1526 (E.D. Mich. 1985). In so doing, the district court relied heavily on *Vishipco Line v. Chase Manhattan Bank, N.A.*, 660 F.2d 854 (2d Cir.1981), *cert. denied*, 459 U.S. 976, 103 S.Ct. 313, 74 L.Ed.2d 291 (1982), a factually analogous case wherein the Second Circuit held Chase Manhattan's home office in New York liable to depositors at its former Saigon branch. Tracking the *Vishipco* court's line of reasoning, the district court first maintained (incorrectly, as heretofore stated in note 1) that Citibank never contended that under Vietnamese law the deposit agreement does not form a basis for recovery; the district court then went on to reject Citibank's three affirmative defenses: *force majeure* as set out in Vietnam's commercial law, assumption of Citibank's liabilities by the National Bank of Vietnam, and confiscation of Trinh's deposit by the communist government. Accordingly, the district court ordered Citibank to pay Trinh the dollar value of his account, with 19% interest.

I believe the district court misperceived Citibank's position and as a result failed to recognize a critical distinction between this case and *Vishipco*. In *Vishipco*, "neither party invoked foreign law with respect to Chase's basic obligations to its depositors and holders of certificates of deposit. Nor did Chase ever suggest that under Vietnamese law those obligations would not have formed a basis for recovery." 660 F.2d at 860. Therefore, the *Vishipco* court cursorily construed the deposit contract under *New York law* and held that the contract rendered Chase liable to its Saigon branch depositors unless Chase could prove an affirmative defense making

the contract unenforceable. Here, on the other hand, Citibank does indeed invoke Vietnamese law regarding its basic contractual obligations to its Saigon branch depositors and vigorously maintains that under Vietnamese law the deposit agreement between it and Trinh does not provide a basis for recovery, quite apart from the validity of its affirmative defenses. In other words, here Citibank argues that, as a threshold matter, the deposit agreement itself precludes recovery, whereas in *Vishipco* Chase apparently conceded that the deposit agreement created liability in the absence of some valid affirmative defense. Consequently, *Vishipco* is inapposite concerning the initial question of the scope of Citibank's contractual obligations to Trinh under Vietnamese law.[5] It is to that question, which is one of first impression, that attention must now be directed.

Citibank concedes that under the deposit agreement its domestic home office must rectify the Saigon branch's failure to pay on Trinh's account if such failure results from financial mismanagement, insolvency, robbery, natural catastrophe, or virtually any other circumstance in which the rectification could still entail payment in Vietnam in piasters. Citibank maintains, however, that under the deposit agreement its domestic home office need not rectify the Saigon branch's failure to pay on Trinh's account if such failure results from political events mak-

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[5] The parties agree, as heretofore stated, that, because Citibank's branch was located in Vietnam and because the account was opened and made payable in Vietnam and in Vietnamese currency, Vietnamese law governs the deposit agreements between Citibank's former Saigon branch and Trinh. *See, e.g., Zimmermann v. Sutherland*, 274 U.S. 253, 47 S.Ct. 625, 71 L.Ed. 1034 (1927); *Dougherty v. National City Bank*, 157 Misc. 849, 285 N.Y.S. 491 (1935); Restatement (Second) of Conflict of Laws § 188 (1971); Uniform Commercial Code § 4-102(2) (1977); Logan and Kantor, *Deposits at Expropriated Foreign Branches of U.S. Banks*, 1982 U. of Ill. L. Rev. 333, 341; Heininger, *Liability of U.S. Banks For Deposits Placed in Their Foreign Branches*, 11 Law & Pol'y Int'l Bus. 903, 944-50 (1969).

ing payment in Vietnam in piasters impossible. (The piaster ceased to exist shortly after the communist government was installed.) In other words, Citibank contends that the deposit agreement implicitly distinguishes between credit risk and sovereign risk, with Citibank bearing the former and Trinh bearing the latter. In Citibank's view, that crucial distinction arises from certain provisions of the deposit agreement construed in light of the Vietnamese and American legal framework in which Citibank's Saigon branch operated.

More precisely, Citibank points to the provisions of the deposit agreement limiting payment on the account to Vietnam and to Vietnamese currency and relieving Citibank's Saigon branch of liability "for any loss or damage suffered or incurred by any depositor resulting from government orders, laws . . . or from any other cause beyond its control." According to Citibank, those clear and simple provisions, construed together, evince the parties' intent to terminate Citibank's responsibility to pay on a deposit where, as here, a governmental revolution precludes payment in Vietnam in piasters.

Moreover, in Citibank's view, such an intent appears from not just the deposit agreement's plain language, but also the background of Vietnamese commercial law. That law incorporates the doctrine of *force majeure*,[6] which, according to uncontradicted expert testimony, requires that losses lie where they fall under the extraordinary circumstances present here. According to Citibank, in the absence of clear contractual language to the contrary, it should be assumed that the parties meant the deposit

[6] Article 701 of the Vietnamese Commercial Code (V.C.C.) provided: "The debtor does not have to pay damages if his violation or non-performance of contractual obligations is due to a fortuitous cause or a case of *force majeure*." Article 1206 of the V.C.C. provided: "The depository is not liable for accidents or risks resulting from *force majeure*, unless previously he has been given notice to return the deposited object."

agreement to be consistent with Vietnam's codification of *force majeure*.

Citibank also maintains that the parties' intent may be inferred in part from American regulations governing foreign branch banking. Citibank notes that the Federal Reserve Board, the federal agency with authority over international banking operations of United States banks, has long encouraged foreign branches to operate, to a significant extent, as separate entities from their domestic home offices, and has permitted foreign branches to offer unusually attractive interest rates in exchange for the depositors' acceptance of the risk of political upheaval. For example, during 1974 and 1975, deposits payable only at an office outside the United States were exempt from reserve requirements and from the then prevailing 5% cap on savings deposit interest rates. *See* 12 C.F.R. §§ 204.2(t), 217.0(c) and 217.7(c) (1974 and 1975). Thus, Trinh's account at Citibank's Saigon branch paid 19% interest, 14% more than a comparable domestic dollar account. Moreover, the Federal Reserve Board expressly warned banks that the reserve and interest exemptions would no longer apply to deposits in foreign branches if banks "entered into agreements . . . with depositors that in effect guarantee payment of such deposits in the United States if the foreign branch is precluded from making payment." 35 Fed. Reg. 2768 (1970), codified at 12 C.F.R. §§ 204.112(c) and 217.146 (1980).[7]

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[7] The Federal Reserve Board went on to say: "In the Board's judgment, the applicability of these exemptions from [reserve requirements and interest rate limitations] is limited to deposits in foreign branches as to which the depositor is entitled, under his agreement with the bank, to demand payment only outside the United States, *regardless of special circumstances*. Said exemptions are intended principally to enable foreign branches of U.S. banks to compete on a more nearly equal basis with other banks in foreign countries in accordance with the laws and regulations of those countries. *A customer who makes a deposit that is payable solely at a foreign branch assumes whatever risk may exist that the*

These regulations, Citibank contends, indicate that the parties meant to restrict payment on Trinh's account to Vietnam and Vietnamese currency under any and all circumstances in order to secure the legality of the 19% interest rate.[8]

In sum, Citibank argues that the deposit agreement itself and the legal framework in which the agreement was made reveal the parties' intent to place on the depositor, Trinh, the risk of loss occasioned by a political catastrophe, such as the violent overthrow of South Vietnam and subsequent confiscation and nationalization of Citibank's Saigon branch, that prevents Citibank from paying on the deposits in Vietnam in piasters.

In response, Trinh contends simply that pursuant to general banking principles under Vietnamese as well as American law, a domestic home office is always ultimately liable for the unpaid debts of its foreign branches, though he cites no Vietnam law to that effect. To support his contention, Trinh relies primarily on the famous *Sokoloff* cases,[9] wherein the New York courts held the National City Bank of New York liable to its Petrograd branch depositors even though the Russian Revolution resulted in

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*foreign country might impose restrictions on withdrawals.* When payment of a deposit in a foreign branch is guaranteed by a promise of payment at a banking office in the United States if not paid at the foreign office, the depositor no longer assumes such risk, but enjoys substantially the same rights as if the deposit had been made in a U.S. office of the bank. To assure the effectiveness of [reserve requirements and interest rate limitations] and to prevent evasions thereof, the Board considers that such guaranteed foreign-branch deposits must be subject to those regulations." 35 Fed. Reg. 2768 (emphasis added).

[8] The majority opinion does not deal with the effect of the Federal Reserve regulation.

[9] *Sokoloff v. National City Bank*, 239 N.Y. 158, 145 N.E. 917 (1924), and *Sokoloff v. National City Bank*, 130 Misc. 66, 224 N.Y.S. 102 (1927).

the confiscation and nationalization of the Petrograd branch. In so holding, the official referee [19] in *Sokoloff* stated:

> Where a bank maintains branches, each branch becomes a separate business entity, with separate books of account . . . Nevertheless, when considered with relation to the parent bank, they are not independent agencies; they are, what their name imports, merely branches and are subject to the supervision and control of the parent bank, and are instrumentalities whereby the parent bank carries on its business, and are established for its own particular purposes, and their business conduct and policies are controlled by the parent bank, and their property and assets belong to the parent bank, although nominally held in the names of the particular branches. *Ultimate liability for a debt of a branch would rest upon the parent bank.*

*Sokoloff v. National City Bank*, 130 Misc. 66, 73, 224 N.Y.S. 102, 114 (1927) (citations omitted) (emphasis added). Moreover, Trinh observes that the *Vishipco* court construed the *Sokoloff* cases to mean that, *as a matter of law*, "[b]y operating in Saigon through a branch rather than through a separate corporate entity, Chase accepted the risk that it would be liable elsewhere for obligations incurred by its branch . . . U.S. banks, by operating abroad through branches rather than through subsidiaries, reassure foreign depositors that their deposits will be safer with them than they would be in a locally incorporated bank." 660 F.2d at 863. Therefore, in Trinh's view, Citibank's home office in New York is legally bound to pay its Saigon branch depositors regard-

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[19] The *Vishipco* court incorrectly identified the referee as "Harrison Tweed, of the Milbank Tweed firm," 660 F.2d at 863. The referee was actually Alfred R. Page. Harrison Tweed was the referee in *Dougherty v. National City Bank*, 157 Misc. 849, 285 N.Y.S. 491 (1935), a case quite damaging to the result reached in *Vishipco*. *See* discussion, *infra*.

less of the nature of the circumstances rendering the Saigon branch unable to pay.

I agree with Citibank that Trinh must bear the loss of his savings deposit. I would so hold because I believe the deposit agreement so requires. In my view, the agreement's clear and specific provisions limiting payment on the deposit to Vietnam and to Vietnamese currency, and relieving the Saigon branch of liability for damage to a depositor caused by governmental actions or causes beyond the branch's control, create a legal relationship between Citibank's domestic home office and its Saigon branch requiring the domestic home office to rectify the Saigon branch's failure to pay on a deposit only if such rectification can occur in Vietnam and in piasters. In other words, the provision discharging the Saigon branch of liability serves to discharge the domestic home office of liability as well if the governmental action or other cause precludes payment in Vietnam in piasters. Here, the communist overthrow of South Vietnam and subsequent confiscation and nationalization of Citibank's Saigon branch surely falls within the deposit agreement's discharge-of-liability provision and prevents Citibank's domestic home office from paying Trinh in Vietnam in piasters. Consequently, the deposit agreement calls for Trinh to suffer the loss and, in turn, Trinh's action against Citibank must fail.

This interpretation of the deposit agreement is buttressed, as Citibank correctly points out, by the legal setting in which the Saigon branch operated. An expert on Vietnamese law testified without dispute that under Vietnamese law losses lie where they fall when extraordinary events such as those present here prevent a bank from honoring its obligation to pay on a deposit. If the parties had intended to bind themselves contractually to a different result by making Citibank's domestic home office a complete guarantor of its Saigon branch, they would have so provided explicitly. Furthermore, in order

to offer Trinh a 19% interest rate legally, Citibank's Saigon branch had to refrain from making any guarantee of payment on Trinh's deposit in the United States; and in order to offer Trinh a 19% interest rate wisely, Citibank's Saigon branch had to allocate to Trinh the risk of political upheaval.

In addition, the *Sokoloff* cases simply do not stand for the broad general proposition that an American bank's home office is always ultimately liable for the debts of its foreign branches. As perceptively and correctly construed by later New York cases, *see Dougherty v. Equitable Life Assurance Soc'y*, 266 N.Y. 71, 193 N.E. 897 (1934); *Dougherty v. National City Bank*, 157 Misc. 849, 285 N.Y.S. 491 (1935), the *Sokoloff* cases stand solely for the narrow principle that, *under New York law*, an American home office is liable for the debts of its foreign branches confiscated and nationalized by a revolutionary regime where the initial deposit is made *in the United States in dollars*. Thus, the *Sokoloff* cases have no application where, as here, Vietnamese law applies and the initial deposit was made in Vietnam in piasters.

Finally, Trinh is absolutely correct that "U.S. banks, by operating abroad through branches rather than through subsidiaries, reassure foreign depositors that their deposits will be safer with them than they would be in a locally incorporated bank." *Vishipco*, 660 F.2d at 863. But that assurance of greater safety applies, under the deposit agreement, only to credit risks, not political risks. As Citibank's *amicus* brief to the *Vishipco* court explained:

> U.S. banks with overseas branches do accept many risks on behalf of their customers, but these risks are economic and not political. For example, Citibank, a debtor when it accepts deposits, assures its depositors that as an institution with massive re-

> sources it will stand behind each deposit at each branch, to the extent it can legally do so. Even if the foreign branch burns down, is unprofitable, becomes insolvent, is robbed or defrauded, or physically disappears by reason of earthquake or other natural disaster, the bank as an institution will continue to operate. In this regard, Citibank and other large banks (domestic or foreign) do provide greater economic security than smaller, local banks.

*Quoted in* Logan and Kantor, *Deposits at Expropriated Foreign Branches of U.S. Banks*, 1982 U. of Ill. L. Rev. 333, 337 n. 9. In other words, Citibank's Saigon branch provided to its depositors greater protection than did local banks because Citibank's domestic home office undertook to stand behind its Saigon branch under virtually all circumstances, all circumstances *except* those in which the governmental actions prevented payment on deposits in Vietnam in piasters. Under the deposit agreement, the risk of those latter circumstances fell on the depositor.

For the foregoing reasons, I would vacate the judgment of the district court and remand for dismissal.

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

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No. 86-1258

NGOC QUANG TRINH

v.

CITIBANK, N.A.

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July 8, 1988

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Judgment of Appeal from the
United States District Court
for the Eastern District of Louisiana

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Before: KEITH and JONES, Circuit Judges, and BROWN, Senior Circuit Judge.

JUDGMENT

ON APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said district court in this case be and the same is hereby affirmed.

IT IS FURTHER ORDERED that Plaintiff-Appellee recover from Defendant-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said district court, if necessary.

ENTERED BY ORDER OF THE COURT
LEONARD GREEN
Clerk

/s/ Leonard Green
Clerk

## APPENDIX B

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

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No. 86-1258

NGOC QUANG TRINH

versus

CITIBANK, N.A.

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Order Denying Motion of Citibank for Rehearing and Suggestion for Hearing *En Banc* Entered on September 21, 1988

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Before: KEITH and JONES, Circuit Judges, and BROWN, Senior Circuit Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

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No. 86-1258

NGOC QUANG TRINH

versus

CITIBANK, N.A.

---

Amendment to Order Denying Motion of Citibank for Rehearing and Suggestion for Hearing *En Banc* Entered on September 22, 1988

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Before: KEITH and JONES, Circuit Judges, and BROWN, Senior Circuit Judge

Upon consideration, it is ORDERED that the order filed on September 21, 1988 denying the petition for rehearing en banc in the above case be amended to add the following paragraph:

> "Judge Brown would grant the petition for rehearing en banc for the reasons stated in his dissent."

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

## APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

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No. 84-CV-2794-DT

NGOC QUANG TRINH

versus

CITIBANK, N.A.

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December 20, 1985

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Lawrence C. John, Detroit, Mich., for plaintiff.

Mason, Steinhardt & Jacobs, John E. Jacobs, Southfield, Mich., Sherman & Sterling, Jennifer Freeman, New York, N.Y., for defendant.

GILMORE, District Judge.

I

This is an action on a debt by which plaintiff seeks the return of deposits made in 1971 by his father into a joint bank account in Citibank, Saigon, Vietnam.

On July 25, 1974, Quang Quy Trinh, plaintiff's father, opened a "Golden Pass Book Account" at Citibank, Saigon, a branch of defendant Citibank, N.A. The account was a joint account in his name and the name of his son, Tinh. The initial deposit was of two million piasters. On

October 25, 1974, Trinh's father made a deposit of one million piasters.

At the time Trinh's father opened this account, Trinh was a student in Michigan. He never returned to Vietnam. He became a United States citizen in 1979. Trinh testified that his father told him about the account and that he understood the account was for him and for his education.

On April 24, 1975, Citibank Saigon closed its operations, leaving its keys at the U.S. Embassy. American and Vietnamese employees of the bank fled the country. On April 30, 1975, the South Vietnamese government in Saigon fell. On May 1, 1975, the revolutionary forces anounced their victory and the creation of a Provisional Revolutionary Government.

Shortly after the fall of Saigon, plaintiff's father was placed in a re-education camp. After his release in 1980, he sent the Citibank Saigon passbook to his son in Michigan. In May 1980, Trinh called the International Division of Citibank in New York to inquire about the deposit. Trinh was told that the National Bank of Vietnam was now responsible for the deposit. On November 5, 1980, Trinh wrote to Walter Winston, Chairman of Citibank, expressing dissatisfaction with this reply, and K.S. Lee, of Citibank, replied on November 17, 1980 that the National Bank of Vietnam was responsible for the Golden Passbook deposit.

Citibank argues that the parent bank is not liable for deposits placed in its foreign branch since the branch is a separate entity. While this is generally true as long as the branch remains open, it ceases to be true if the branch closes or wrongfully refuses to return a deposit. The leading case of *Sokoloff v. National City Bank*, 239 N.Y. 158, 145 N.E. 917 (1924), established the principle that the home office of a bank is liable on a deposit placed in its foreign branch when the branch has wrongfully

failed to return the deposit. *See also* Heininger, *Liability of U.S. Banks for Deposits Placed in Their Foreign Branches*, 11 Law and Pol. Int'l Bus. 903, 926 (1979), and *Sokoloff v. National City Bank*, 130 Misc. 66, 224 N.Y.S. 102 (Sup.Ct. 1927), *aff'd* 250 N.Y. 69, 164 N.E. 745 (1928).

The principles of *Sokoloff* have recently been applied by the Second Circuit in a case very similar to the case at bar. In *Vishipco Line v. Chase Manhattan Bank, N.A.* 660 F.2d 854 (1981), one individual and several corporate plaintiffs sought the return from Chase Manhattan Bank in New York of deposits that had been made in Chase's Saigon branch prior to the fall of South Vietnam. Chase left Vietnam on the same date as Citibank under similar circumstances. The legal arguments presented, as well as the facts of the two cases, are similar.

The *Vishipco* Court found Chase liable on the deposits in question. This Court finds the reasoning in *Vishipco* persuasive. As in *Vishipco*, the bank in this case is in the relationship of debtor to its depositor. When Citibank Saigon closed its doors without warning, the parent bank became liable on the deposit. Nonetheless, Citibank argues that it is relieved of this liability by the Vietnamese law of *force majeure*, by the assumption of its liabilities by the National Bank of Vietnam, and by the confiscation of Trinh's account. Although these arguments failed in *Vishipco, supra*, Citibank argues that its situation is distinguishable and that, therefore, these defenses should succeed here. The Court rejects this argument for the reasons stated below.

II

Jurisdiction is founded both upon diversity and upon the existence of a federal question. Trinh is a citizen of Michigan, and Citibank is a national bank located in New York. National banks are treated as citizens of the state in which they are located. *See* 13B C. Wright and A.

Miller, *Federal Practice and Procedure* § 3571 (1984). The $10,000 amount in controversy requirement is met because plaintiff claims that as of November 5, 1980 (the date of plaintiff's demand letter), the original 3,000,000 piaster deposit was worth $12,333. Defendant's argument that the amount in controversy is not met because the piaster is valueless cannot prevail since plaintiff's claim is made in good faith and it does not appear to a legal certainty that the claim is really for less than $10,000. *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 58 S.Ct. 586, 82 L.Ed. 845 (1938).

In addition, the Court has federal question jurisdiction over this action under 12 U.S.C. § 632, which states in pertinent part:

> Notwithstanding any other provision of law, all suits of a civil nature at common law or in equity to which any corporation organized under the laws of the United States shall be a party, arising out of transactions involving international or foreign banking, or banking in a dependency or insular possession of the United States, or out of other international or foreign financial operations, either directly or through the agency, ownership, or control of branches or local institutions in dependencies or insular possessions of the United States or in foreign countries, shall be deemed to arise under the laws of the United States, and the district courts of the United States shall have original jurisdiction of all such suits; and any defendant in any such suit may, at any time before the trial thereof, remove such suits from a State court into the district court of the United States for the proper district by following the procedure for the removal of causes otherwise provided by law.

Defendant is a corporation organized under the laws of the United States, and this case arises out of a transaction involving foreign banking, or banking in a branch in a foreign country.

## III

Defendant has attempted to distinguish the case at bar from *Vishipco, supra*, based in part on choice of law principles. Therefore, analysis of defendant's position must begin with a discussion of the choice of law rules that apply.

Plaintiff and defendant both correctly argue that federal courts sitting in diversity apply the choice of law rules of the forum state. *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). However, defendant further argues that, because there is federal question jurisdiction here, and because in federal question cases federal common law choice of law rules apply, *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 629 F.2d 786 (2d Cir. 1980), *cert. denied* 449 U.S. 1080, 101 S.Ct. 863, 66 L.Ed.2d 804 (1981), this Court must apply federal common law choice of law rules.

It is not clear that, when a federal court has both diversity and federal question jurisdiction, federal common law choice of law rules must be applied. In *Corporacion Venezolana de Fomento v. Vintero Sales Corp., supra*, the court had only federal question jurisdiction under 12 U.S.C. § 632. The court held it did not have diversity jurisdiction because of the presence of aliens as parties on both sides of the case. The court did not say what result would obtain if it had *both* federal question and diversity jurisdiction. The court did say that "[w]ere this a diversity case, *Klaxon* (citation omitted) would require that we look to the choice of law doctrines of the forum state." *Id.* at 795. However, since it had only federal question jurisdiction, it looked to federal common law choice of law doctrine.

In *Citibank, N.A. v. Benkoczy*, 561 F. Supp. 184 (S.D. Fla. 1983), Citibank sued Florida residents on a guarantee of obligations of a Haitian corporation. The court did

not state whether it had diversity jurisdiction. The court held that it had jurisdiction under 12 U.S.C. 632, and applied federal common law choice of law rules. The court noted that, "[w]ere this a diversity case, the decision as to what substantive law to apply would be controlled by the conflicts of law rules of the forum state, Florida." The court did not explicitly state whether it applied federal choice of law rules *because* it had no diversity jurisdiction or in spite of having diversity jurisdiction.

Research has not disclosed any case exactly on point. However, *Stud v. Trans International Airlines*, 727 F.2d 880 (9th Cir. 1984) suggests that, where diversity jurisdiction exists in addition to federal question jurisdiction, the forum state's choice of law rules can be used. The *Stud* court said:

> Because our jurisdiction is based not simply on the existence of a federal question under the version of the Warsaw Convention in force in the United States, (citation omitted), but on diversity of citizenship as well, we are not compelled to apply the United States version of the Convention. Instead, we use the choice of law rules of California, the state in which this action was filed, to determine the applicable law.

Id. at 881.

And *Cutler v. Bank of America National Trust & Savings Association*, 441 F. Supp. 863, 865 (N.D. Cal. 1977), in a case in which jurisdiction was based on 12 U.S.C. § 632, applied the choice of law rules of the forum because "[I]t is established law that the source of the right, rather than the basis of federal jurisdiction invoked, controls determination of the applicable law . . ." *Id.* at 865.

Of course, the question of whether to apply Michigan's choice of law rules or federal common law choice of law

rules only matters if they would lead to a different result in this case. Plaintiff argues that Michigan's choice of law rules would require this Court to apply Michigan law to his claim. Defendant argues that both Michigan and federal common law choice of law rules require this Court to apply the law of Vietnam.

As to the federal common law choice of law rules, defendant cites *Aaron Ferer & Sons Ltd. v. Chase Manhattan Bank*, 731 F.2d 112 (2d Cir. 1984). In that case, which arose under 12 U.S.C. § 632, the court applied the federal choice of law rules as follows: As to the issue of restitution, the court analyzed the relationship of the occurences and parties to New York in accordance with the Restatement (Second) Conflict of Laws § 221 (1971) and concluded that New York law governed because the banking relationship between the parties arose there, the banking transactions occurred there, Chase's principal office was located there, the plaintiff had an office there, and Chase received plaintiff's money there.

Here, Citibank notes only the first relationship, i.e. that the banking relationship was in New York. However, the Restatement (Second) Conflict of Laws § 188 and § 221 (1971) suggest that a whole range of contacts be examined, as indeed the *Aaron Ferer* court did. In the case at bar, the relationship does not point as unequivocally to Vietnam as it pointed to New York in *Aaron Ferer*. The banking relationship did begin in Vietnam, the transactions took place in Vietnam, and defendant Citibank did receive plaintiff's money in Vietnam. However, Citibank's principal office is in New York, and it is no longer located in Vietnam at all. Plaintiff resides in Michigan, and the "thing" involved here—the debt—is no longer located in Vietnam (under the rule of *Vishipco, supra*). Although this case has contacts with both New York and Vietnam, the more significant contacts are with Vietnam.

Defendant argues, and plaintiff admits, that the general Michigan choice of law rule is that a contract is

governed by the law of the place where it is made. *Wells v. 10-X Manufacturing Co.*, 609 F.2d 248 (6th Cir. 1979). There, the general rule would point this Court to the law of Vietnam. Plaintiff's cases cited for exceptions to this rule do not obtain here. Plaintiff cites *Mills v. Anderson*, 238 Mich. 643 (1927) for the principle that where a creditor is domiciled in Michigan, Michigan courts apply Michigan law. However, in that case, the court found the situs of the debt in issue to be with the *debtor* in Michigan. Plaintiff's other cases deal with the question of the situs of a debt, but not with the question of choice of law.

Michigan's adoption of the Uniform Commercial Code provides the explicit statutory choice of law rule. M.C.L.A. § 440.4102 states:

> (2) The liability of a bank for action or non-action with respect to any item handled by it for purposes of presentment, payment or collection is governed by the law of the place where the bank is located. In the case of action or non-action by or at a branch or separate office of a bank, its liability is governed by the law of the place where the branch or separate office is located.

Plaintiff ignores this provision. Defendant cites it without analyzing it. There are no Michigan cases annotated under it. Heininger, *Liability of U.S. Banks For Deposits Placed in Their Foreign Branches*, *supra*, discusses this U.C.C. provision as "pointing" to choosing the law of the place where the branch is located.

Plaintiff's claim that the law of Michigan applies must clearly be rejected. Michigan and federal choice of law rules require application of either the law of Vietnam or the law of New York. Under the federal choice of law analysis, Vietnam has the most significant contacts with the action. Michigan common law and M.C.L.A. 440.4102 (2) indicate that the law of Vietnam should be applied in this case.

IV

The choice of law determination that the law of Vietnam applies does not distinguish this case from *Vishipco, supra.* In *Vishipco* the court applied the law of New York to the "underlying obligation," and the law of Vietnam to Chase Manhattan's defenses. There, defendant Chase Manhattan Bank argued that, since New York's choice of law rules called for the case to be governed by the law of Vietnam, and since the plaintiffs had failed to prove they were entitled to recover under Vietnamese law, plaintiff's claims were dismissible under Fed.R. Civ.P. § 44.1. The Second Circuit rejected that argument, holding:

> While, as the Advisory Committee's notes to Rule 44.1 make clear, a court is still permitted to apply foreign law even if not requested by a party, we believe that the law of the forum may be applied here, where the parties did not at trial take the position that plaintiffs were required to prove their claims under Vietnamese law, even though the forum's choice of law rules would have called for the application of foreign law. This reflects the view adopted by ourselves and other federal courts since 1966.

*Id.* at 860.

The Court went on to say:

> While Chase invoked foreign law under Rule 44.1 with respect to its own affirmative defenses only, neither party invoked foreign law with respect to Chase's basic obligations to its depositors and holders of certificates of deposit. Nor did Chase ever suggest that under Vietnamese law those obligations would not have formed a basis for recovery.

*Id.* at 860.

The court then held that it would apply New York law to Chase's underlying obligation, and that under New

York law, unless relieved by a defense, Chase was obligated to pay plaintiffs the sums deposited with it.

In the present case, Citibank argues that, unlike Chase in *Vishipco*, it has, throughout pre-trial and at trial, taken the position that Trinh must prove his claim under Vietnamese law. Citibank further argues that Trinh cannot do so because the Vietnamese law of *force majeure* applies to Trinh's claim and relieves Citibank of liability on the deposit. The Court does not agree.

The instant case is not procedurally or factually distinguishable from *Vishipco* on this point. In the same sense that the *Vishipco* court says Chase never invoked foreign law as to its underlying obligation on the deposits, Citibank, in the present case, has never argued that, under the law of Vietnam, Trinh's deposits do not equal a debt of the bank or from an underlying basis for recovery.

Furthermore, the *Vishipco* court did address the argument that *force majeure* relieved Chase of liability. The court addressed this argument as an affirmative defense to which it applied the law of Vietnam. This is essentially no different from what Citibank asks this Court to do. The *Vishipco* court rejected Chase's arguments, which are directly analogous to the arguments Citibank makes here, as follows:

> Chase next argues that under Vietnamese law its failure to repay plaintiffs' deposits in the period prior to May 1, 1975, was not a breach of its deposit contract, because the conditions prevailing in Saigon at the time rendered payment impossible. In support of this argument, *Chase cites various sections of the South Vietnamese Civil Code which excuse performance under various extenuating circumstances*, as well as the provisions included in the deposit contracts used by the Saigon branch which purported to discharge the bank's responsibility for losses to de-

positors resulting from a variety of unexpected and uncontrollable sources.

This argument must be rejected for the reasons that impossibility of performance in Vietnam did not relieve Chase of its obligation to perform elsewhere. By operating in Saigon through a branch rather than through a separate corporate entity, Chase accepted the risk that it would be liable elsewhere for obligations incurred by its branch.

* * * *

U.S. banks, by operating abroad through branches rather than through subsidiaries, reassure foreign depositors that their deposits will be safer with them than they would be in a locally incorporated bank. *Heininger, supra*, at 911-12. Indeed, the national policy in South Vietnam, where foreign banks were permitted to operate only through branches, was to enable those depositing in foreign branches to gain more protection than they would have received had their money been deposited in locally incorporated subsidiaries of foreign banks. Chase's defenses of impossibility and *force majeure* might have succeeded if the Saigon branch had been locally incorporated or (more problematically) if the deposit contract had included an explicit waiver on the part of the depositor of any right to proceed against the home office. But absent such circumstances the Saigon branch's admitted inability to perform did not relieve the Chase of liability on its debts in Saigon, since the conditions in Saigon were no bar to performance in New York or at other points outside of Vietnam.

*Id.* at 863-64.

Thus, Citibank has failed to meaningfully distinguish itself from *Vishipco*.

Even if the Court accepts Citibank's proposition that the *force majeure* provisions of the Vietnamese Commercial Code apply to the underlying obligation of Citibank on the deposits it accepted, an analysis of those provisions applied to the facts of this case indicates that they do not relieve Citibank of liability.

The relevant provisions of Vietnamese law argued by Citibank are as follows:

> The depositary is not liable for accidents or risks resulting from *force majeure*, unless previously he has been given notice to return the deposited object.

Article 1206 of Vietnam Commercial Code.

> The debtor does not have to pay damages if his violation or non-performance of contractual obligations is due to a fortuitous cause or a case of *force majeure*.

Article 701 of the Vietnam Commercial Code.

Mr. Ta Van Tai, Citibank's expert witness on Vietnamese law, testified that *force majeure* is a French term to describe acts of God, acts of government, and any fortuitous cause beyond the control of the parties in the contract. Defendant offered Mr. Tai's opinion that this Vietnamese law applied to relieve Citibank of liability on its deposits when it closed its doors and left Vietnam on April 25, 1975.

This Court is not bound by Mr. Tai's opinion as to the application of Vietnamese law to this case. The Vietnamese *force majeure* law does not relieve Citibank of liability on its deposits in this case for the following reasons.

First, Citibank's closure and departure from Vietnam was clearly not due to an act of God. Neither was it due to an act of government. Citibank closed its doors on April 24, 1975, a week before the fall of South Vietnam.

In fact, it is clear from the April 25, 1975 joint communique of the South Vietnamese Finance Ministry and the National Bank that the government considered Citibank's action to be illegal. A news report of the communique, provided in defendant's exhibit 29, states that those two agencies announced "the Chase Manhattan Bank, the First National City Bank, and the Bank of America had closed temporarily without asking for permission from our government." The report went on to state, "The Finance Ministry and the National Bank will apply sanctions against these banks according to law." Clearly, the government of South Vietnam did not close the bank. And, of course, the revolutionary forces had not yet gained control and thus did not close Citibank. Citibank closed itself.

Citibank presented a great deal of evidence as to the chaotic situation in Saigon in April, and as to its humanitarian efforts to remove its Vietnamese employees from the country before the capitol fell. The gist of Citibank's argument is that this evidence shows that the closing of Citibank falls within the third definition of *force majeure*, i.e. that Citibank closed due to a fortuitious [sic] cause outside of its control. This fortitutious [sic] cause, Citibank argues, was the impending collapse of Saigon and the danger posed by the new regime to Citibank's Vietnamese employees.

However, Citibank's response to the political situation in Vietnam was a voluntary choice. Banks do not have to close in the face of impending revolutions, and they do not always do so. The decision to close was not beyond Citibank's control.

Citibank's position seems to be that, because the military and political situation of Vietnam was out of its control, its response to the situation (the decision to close) was also out of its control. If this were the meaning of *force majeure*, then, by analogy, *force majeure*

would apply to relieve a bank of liability when changes beyond its control in world financial markets made a branch unprofitable, and it therefore decided to close the branch and cut its losses. This cannot be the meaning of *force majeure*.

For the same reasons, Citibank's defense based on the *force majeure* clause in its deposit agreement must also fail even though it is enforceable under Vietnamese law.

Thus, Citibank has not meaningfully distinguished this case from *Vishipco*, *supra*, and the application of Vietnamese law does not relieve Citibank of its liability on Trinh's deposit.

V

Citibank's proofs regarding the assumption of its assets and liabilities by the National Bank of Vietnam do not distinguish this case from *Vishipco*, *supra*.

Citibank argues that it is relieved of liability on Trinh's deposit because the National Bank of Vietnam assumed its assets and liabilities and became its successor in interest. Since this argument was not made by Chase in *Vishipco*, Citibank argues it has distinguished itself from *Vishipco* sufficiently to call for a different result.

Chase did argue in *Vishipco* that the plaintiff corporation had been nationalized by the revolutionary administration and that, therefore, the government of Vietnam, rather than the exiled corporate directors, was the successor in interest of the corporations with standing to sue. The *Vishipco* court said that, in order to prove successorship in interest, the defendant had to prove that the government had stepped into the corporation's shoes and formally assumed both its assets and liabilities. In the case at bar, Citibank argues it has proved that the National Bank of Vietnam formally assumed both its assets and liabilities and became the successor in interest to Trinh's deposit.

Citibank's argument fails for two reasons. First, it is doubtful whether the National Bank of Vietnam could have assumed liability for Citibank's debt to Trinh since the *situs* of the debt was no longer in Vietnam at the time that Citibank claims the assumption took place. See discussion of confiscation, *infra*, at pp. 1535-36.

Second, even if the National Bank of Vietnam could have assumed Citibanks' liabilities, Citibank has not proved that it did so.

Citibank relies on three published announcements. The first of these, an April 25, 1975 joint communique of the National Bank and the Finance Ministry, is irrelevant since it is an announcement of the old regime before it fell to the Communists. Although the Revolutionary Administration allowed the National Bank of Vietnam to resume operation under the same name, Citibank's own proofs indicate that the bank was completely reorganized to conform to the revolutionary government's policies. There is no reason to believe that any statement or promise of the old regime was binding on the new.

Citibank further relies on newspaper announcements, dated September 7, 1975 and September 14, 1975, that the National Bank guaranteed it would gradually repay savings accounts to workers and laboring people. However, Citibank's proofs with regard to the National Bank's position on the deposits in foreign banks is equivocal at best. The June 17, 1975 communique contained in Citibank's Exhibit 33 states:

> With regard to previous deposits, securities and savings, all debtor banks, including *all foreign banks, must accept responsibility for their liquidation and the submission of their records to the Vietnam National Bank. After settlement with banks*, the Vietnam National Bank will conduct reviews and make known authorization to use deposits in accordance with production and commercial requirements and

> will pay out savings to workers and people according to new banking regulations. The Vietnam National Bank will not accept responsibility for improper or illegal activities by private banks.

The September 7, 1975 newspaper article relied on by Citibank also states:

> As regards persons wanting to withdraw money on deposit at a bank for use in agricultural, industrial or commercial development while *awaiting the settlement of accounts with the private banks*, the National Banks of Vietnam will study and satisfactorily meet loan requests for reasonable business and production needs.
>
> * * * *
>
> At present, the National Bank is allowing the various private banks to operate under the management of the national bank so that they can carry out their business operations *while settling their accounts*, such as collecting outstanding loans and returning savings accounts in accordance with regulations.
>
> *As regards banks whose owners have fled the country, the national bank will inventory and re-evaluate their assets and settle their accounts in order to determine their ability to return the savings of account holders; the bank will issue a notice concerning these persons.* (emphasis added)

Finally, the newspaper story of September 14, 1975 describes as a "very correct type of thinking" a willingness to write off as a loss treasury bond investments and "losses in bank money that went overseas and losses due to incorrect operation and to corruption in the private banks." These announcements do not indicate an unqualified assumption of all liabilities. In particular, there does not appear to be any clear assumption of the liabilities of banks that fled the country.

Finally, even the testimony of Citibank's witness Tai is that the National Bank had promised to repay savings accounts only to selected groups of people (workers). There is nothing to indicate that the National Bank assumed liability for the account of Trinh's father, a senator of the fallen regime. In fact, Citibank argues this account was confiscated.

The Court finds as a matter of fact that on this record Citibank has failed to prove that the National Bank of Vietnam assumed its liability on Trinh's deposit and became its successor in interest.

VI

Citibank's proofs as to confiscation of the account do not distinguish this case from *Vishipco, supra.*

Citibank also argues that it is distinguishable from *Vishipco* because it has succeeded in proving that the bank and the account at issue were confiscated whereas Chase in *Vishipco* failed to prove confiscation. This argument fails for two reasons. First, there is no significant difference between the circumstances of Chase's and Citibank's departures from Saigon. Chase gave its keys to the French Embassy; Citibank left its keys at the American Embassy with instructions to turn them over to the Vietnamese. The *Vishipco* court found that the French Embassy had turned over Chase's records to the revolutionary government. Citibank, in the case at bar, presented no evidence that the revolutionary government had in fact received its keys and records. There is no basis for Citibank's contention that these facts make its case stronger on the issue of confiscation than *Vishipco.*

More importantly, here, as in *Vishipco*, at the time of the confiscation decrees the deposit no longer had its *situs* in Vietnam. The reasoning in *Vishipco* is clear and persuasive. A debt is not located in a foreign state unless that state has the power to enforce or collect it, which

depends on jurisdiction over the debtor. Citibank no longer had any presence in Vietnam, and the revolutionary government had no jurisdiction over it. Hence, the confiscation decrees could have no effect on Citibank's debt to Trinh. *See Vishipco, supra* at 862. As that Court said, quoting a qualified commentator:

> The situs of a bank's debt on a deposit is considered to be at the branch where the deposit is carried, but if the branch is closed, . . . the depositor has a claim against the home office; thus, the situs of the debt represented by the deposit would spring back and cling to the home office. If the situs of the debt ceased to be within the territorial jurisdiction of [the confiscating state] from the time the branch was closed, then at the time the confiscatory decree was promulgated, [the confiscating state would] no longer [have] sufficient jurisdiction over it to affect it. . . . [U]nder the act of state doctrine, the courts of the United States are not bound to give effect to foreign acts of state as to property outside the acting state's territorial jurisdiction. Heininger, *Liability of U.S. Banks for Deposits Placed in Their Foreign Branches*, 11 Law & Pol. Int'l Bus. 903, 975 (1969) (footnotes omitted)

*Id.* at 862-63.

Citibank's defense that Trinh's account was confiscated must fail, just as the identical defense failed in *Vishipco*. Citibank has failed to distinguish itself from *Vishipco* in any important respect. This Court finds the reasoning in *Vishipco* persuasive, and, for all the reasons stated above, finds Citibank liable to Trinh on the deposit account.

VII

Both parties agree, and the law is settled, that a United States District Court can award judgment only in dollars. Thus, this Court faces the difficult task of

translating the account (which consisted of 3,000,000 piasters on October 25, 1974) into a judgment in dollars.

The difficulty of this task is compounded by the fact that the piaster no longer exists but was replaced by the South Vietnam dong on September 22, 1975. The South Vietnam dong was in turn replaced by the Vietnam dong on May 3, 1978. The difficulty of this task is further complicated by the fact that the piaster was a blocked currency (it could not be taken out of Vietnam) and it is currently illegal to trade in the Vietnam dong.

The first question is whether to convert the amount owed into dollars on the day of the breach (as argued by plaintiff) or on the day of the judgment (as argued by defendant). Whether to convert as of the breach day or the judgment day has presented a perplexing problem to federal courts, which have not always reached consistent results. *See* Becker, *The Currency of Judgment*, 25 Am.J.Comp.L. 2 152 (1977).

The Court finds that the answer to this question is governed by three Supreme Court opinions written by Justice Holmes. In *Hicks v. Guinness*, 269 U.S. 71, 46 S.Ct. 46, 70 L.Ed. 168 (1925), a German firm was indebted to an American firm on an account stated in marks on December 31, 1916 and payable to the American firm in the United States. The Court held that the American firm was entitled to recover the value in dollars that the mark had when the account *was stated*, saying:

> The loss for which the plaintiff is entitled to be indemnified is "the loss of what the contractor would have had if the contract had been performed," (citation omitted); it happens at the moment when the contract is broken, just as it does when a tort is committed, and the plaintiff's claim is for the amount of that loss valued in money at that time.

*Id.* at 80, 46 S.Ct. at 47.

However, one year later, in *Deutsche Bank Filiale Nurnberg v. Humphrey*, 272 U.S. 517, 47 S.Ct. 166, 71 L.Ed. 383 (1926), the Court found it erroneous to convert until the time of judgment. In that case, a U.S. depositor in a German bank had demanded his deposit on June 12, 1914. The debt was in marks. The Court said that, unlike the case in *Hicks*, on the date of demand the German bank owed no duty to the plaintiff *under U.S. law*. Thus, the obligation was fixed in marks on the date of demand and took the risk of later currency fluctuations.

In *Zimmerman v. Sutherland*, 274 U.S. 253, 47 S.Ct. 625, 71 L.Ed. 1034 (1927), Justice Holmes resolved the apparent contradiction between *Hicks* and *Deutsche Bank:*

> The decision of the Circuit Court of Appeals was right, and in view of the recent case of *Deutsche Bank Filiale Nurnburg v. Humphrey*, 272 U.S. 517 [47 S.Ct. 166], does not need extended reasoning. Here as there the debt was due and payable in the foreign Country. The only primary obligation was that created by the law of Austria-Hungary and if by reason of an attachment of property or otherwise the courts of the United States also gave a remedy the only thing that they could do with justice was to enforce the obligation as it stood, not to substitute something else that seemed to them about fair. *The distinction between the Deutsche Bank Case and Hicks v. Guinness, 269 U.S. 74 [46 S.Ct. 46], is not, as argued, that the plaintiff in Hicks v. Guinness was in the United States, but that, as the court understood the facts, the debt was payable in New York and subject to American law, so that upon a breach of the contract there arose a present liability in dollars.* (emphasis added.)

*Id.* at 255-56, 47 S.Ct. at 625-26.

Thus, where a debt in foreign currency is payable in a foreign country, the judgment day rule applies. This assumes a uniform result whether the suit is brought in the foreign country or in the United States. *See Shaw, Savill, Albion & Co., Ltd. v. The Fredericksburg*, 189 F.2d 952 (2d Cir. 1951).

However, where the obligation is payable in the United States, conversion is proper at the rate current at the time of breach. *See Bamberger v. Clark*, 390 F.2d 485 (D.C.Cir. 1968).

In the present case, the Court has held that the situs of Citibank's debt to Trinh sprang back to the home office when the Saigon branch was closed. Thus, Trinh has a claim against the home office. This is obviously payable in the United States. Also, there is no possibility of a suit in Vietnam to recover the deposit. Thus, under *Hicks, supra*, a present liability in dollars arose when Citibank wrongfully refused Trinh's demand on November 17, 1980. Therefore, the Court will apply the conversion rate in existence on November 17, 1980, the date of the breach.

Next, the Court must determine what rate of exchange to apply. Plaintiff urges the Court to convert the account into dollars at the effective rate of exchange in November 1980, which the evidence showed to be 2.39 Vietnam dongs to the dollar. Citibank urges the Court to convert the account into dollars at the unofficial market rate, which the evidence showed to be 17 Vietnam dongs to the dollar in November 1980.

The Court finds that the proper rate of conversion is the unofficial market rate of 17 dongs to the dollar. Courts have refused to look at official rates of exchange when currencies are blocked or when the official rate otherwise does not apply to the transaction at hand. *See Hughes Tool Co. v. United Artists Corp.*, 279 App.

Div. 417, 110 N.Y.S.2d 383 (1952), aff'd 304 N.Y. 942, 110 N.E.2d 884 (1953). *Cinelli v. CIR*, 502 F.2d 695 (6th Cir. 1974). Courts instead seek to apply commercial rates of exchange that reflect actual fair market value of foreign currency. Thus, the Court of Appeals for the Second Circuit directed the District Court in the *Vishipco* case (where, as here, there was no New York market rate of exchange since trading in Vietnamese currency is illegal in the U.S.) to determine the "true value" of the piaster and to evaluate the underground market for dollars in Saigon at the date of the breach. *Vishipco Line v. The Chase Manhattan Bank*, 754 F.2d 452 (2d Cir. 1985).

In the present case, plaintiff's Exhibit 7, which is the Vietnam dong section of the 1984 World Currency Year Book, together with the testimony of plaintiff's and defendant's experts, showed that an active unofficial or black market in dollars exists in Vietnam, and that the exchange rate of this market in November 1980 was 17 Vietnam dongs to the dollar. This is the proper rate to apply, rather than the effective rate, since the evidence showed that no individual could really trade at the effective rate set by the government of Vietnam.

Next, the Court must determine the interest the account earned. Plaintiff has alleged, but failed to prove, that the account drew 24% interest. Citibank's testimony showed that the account earned 19% interest, compounded daily.

Finally, the Court must trace the piaster deposit through the Vietnam currency conversions decided above. These conversion rates are not in dispute. They are as follows:

| | |
|---|---|
| Sept. 22, 1975 | 500 piasters = 1 South Vietnam dong |
| May 3, 1978 | .80 South Vietnam dongs = 1 Vietnam dong |

The Court can now calculate the amount Citibank owes on the account. The starting point is the 3,000,000 piasters shown in the pass book on October 25, 1974.

| | |
|---|---|
| October 25, 1974 | 3,000,000.00 piasters |
| September 22, 1975 principal plus interest at 19% compounded daily | 3,584,408.14 piasters |
| September 22, 1975 conversion from piasters to South Vietnam dongs (500 piasters = 1 South Vietnam dong) | 7,168.82 South Vietnam dongs |
| May 3, 1978 principal, plus interest at 19% compounded daily | 11,771.64 Vietnam dongs |
| May 3, 1978 conversion from South Vietnam dongs to Vietnam dongs (.80 South Vietnam dongs = 1 Vietnam dong) | 14,714.56 Vietnam dongs |
| November 17, 1980 principal, plus interest at 19% compounded daily | 23,862.32 Vietnam dongs |
| November 17, 1980 conversion from Vietnam dongs to U.S. Dollars (17 dongs = 1 dollar) | $1,403.67 |

Defendant is ordered to pay plaintiff $1,403.67, plus statutory interest from November 17, 1980.

This opinion constitutes the findings of fact and conclusions of law required by FRCP 52(a).

## APPENDIX D

12 U.S.C. § 601 (1982)

§ 601. Authorization, conditions and regulations

Any national banking association possessing a capital and surplus of $1,000,000 or more may file application with the Board of Governors of the Federal Reserve System for permission to exercise, upon such conditions and under such regulations as may be prescribed by the said board, the following powers: First. To establish branches in foreign countries or dependencies or insolar possessions of the United States for the furtherance of the foreign commerce of the United States, and to act, if required to do so, as fiscal agents of the United States.

* * * *

## APPENDIX E

### 12 U.S.C. § 604a (1982)

§ 604a. Regulations authorizing exercise by foreign branches of usual powers of local banks; restrictions

Regulations issued by the Board of Governors of the Federal Reserve System under this subchapter, in addition to regulating powers which a foreign branch may exercise under other provisions of law, may authorize such a foreign branch, subject to such condition and requirements as such regulations may prescribe, to exercise such further powers as may be usual in connection with the transaction of the business of banking in the places where such foreign branch shall transact business. Such regulations shall not authorize a foreign branch to engage in the general business of producing, distributing, buying or selling goods, wares, or merchandise; nor, except to such limited extent as the Board may deem to be necessary with respect to securities issued by any "foreign state" as defined in section 632 of this title, shall such regulations authorize a foreign branch to engage or participate, directly or indirectly, in the business of underwriting, selling, or distributing securities.

## APPENDIX F

12 U.S.C. § 461(b) (1982)

§ 461. Reserve requirements

(b) Additional definitions . . . reserves related to foreign obligations or assets; exemption for certain deposits . . .

* * * *

(2)(A) Each depository institution shall maintain reserves against its transaction accounts as the Board may prescribe by regulation solely for the purpose of implementing monetary policy—

(i) in the ratio of 3 per centum for that portion of its total transaction accounts of $25,000,000 or less, subject to subparagraph (C); and

(ii) in the ratio of 12 per centum, or in such other ratio as the Board may prescribe not greater than 14 per centum and not less than 8 per centum, for that portion of its total transaction accounts in excess of $25,000,000, subject to subparagraph (C).

(B) Each depository institution shall maintain reserves against its nonpersonal time deposits in the ratio of 3 per centum, or in such other ratio not greater than 9 per centum and not less than zero per centum as the Board may prescribe by regulation solely for the purpose of implementing monetary policy.

(C) Beginning in 1981, not later than December 31 of each year the Board shall issue a regulation increasing for the next succeeding calendar year the dollar amount which is contained in subparagraph (A) or which was last determined pursuant to this subparagraph for the purpose of such subparagraph, by an amount obtained by multiplying such dollar

amount by 80 per centum of the percentage increase in the total transaction accounts of all depository institutions. The increase in such transaction accounts shall be determined by subtracting the amount of such accounts on June 30 of the preceding calendar year from the amount of such accounts on June 30 of the calendar year involved. In the case of any such 12-month period in which there has been a decrease in the total transaction accounts of all depository institutions, the Board shall issue such a regulation decreasing for the next succeeding calendar year such dollar amount by an amount obtained by multiplying such dollar amount by 80 per centum of the percentage decrease in the total transaction accounts of all depository institutions. The decrease in such transaction accounts shall be determined by subtracting the amount of such accounts on June 30 of the calendar year involved from the amount of such accounts on June 30 of the previous calender year.

(D) Any reserve requirement imposed under this subsection shall be uniformly applied to all transaction accounts at all depository institutions. Reserve requirements imposed under this subsection shall be uniformly applied to nonpersonal time deposits at all depository institutions, except that such requirements may vary by the maturity of such deposits.

* * * *

(6) The requirements posed under paragraph (2) shall not apply to deposits payable only outside the States of the United States and the District of Columbia, except that nothing in this subsection limits the authority of the Board to impose conditions and requirements on member banks under section 25 of this Act [12 U.S.C. 601 et seq.] or the authority of the Board under section 3105 of this title.

* * * *

## APPENDIX G

12 U.S.C. §§ 1811, 1813 (1982)

§ 1811. Creation of Corporation; duties

There is created a Federal Deposit Insurance Corporation (hereinafter referred to as the "Corporation") which shall insure, as hereinafter provided, the deposits of all banks which are entitled to the benefits of insurance under this chapter, and which shall have the powers hereinafter granted.

* * * *

§ 1813. Definitions

As used in this chapter—

(d) The term "national member bank" means any national bank located in any of the States of the United States, the District of Columbia, any Territory of the United States, Puerto Rico, Guam, American Samoa, or the Virgin Islands which is a member of the Federal Reserve System.

* * * *

(*l*) The term "deposit" means—

* * * *

(5) such other obligations of a bank as the Board of Directors, after consultation with the Comptroller of the Currency and the Board of Governors of the Federal Reserve System, shall find and prescribe by regulation to be deposit liabilities by general usage, except that the following shall not be a deposit for any of the purposes of this chapter or be included as part of the total deposits or of an insured deposit:

(A) any obligation of a bank which is payable only at an office of such bank located outside of the States of the United States, the District of Columbia, Puerto Rico, Guam, American Samoa, the Trust Ter-

ritory of the Pacific Islands, and the Virgin Islands; and

(B) any international banking facility deposit, including an international banking facility time deposit, as such term is from time to time defined by the Board of Governors of the Federal Reserve System in regulation D or any successor regulation issued by the Board of Governors of the Federal Reserve System.

* * * *

## APPENDIX H

## 35 FEDERAL REGISTER 2768 (1970)

## PART 204—RESERVES OF MEMBER BANKS

## PART 217—INTERESTS ON DEPOSITS

### Deposits in Foreign Branches

§ 204.112 Deposits in foreign branches guaranteed by domestic office of member bank.

(a) In accepting deposits at branches abroad, some member banks are reported to have entered into agreements from time to time with depositors that in effect guarantee payment of such deposits in the United States if the foreign branch is precluded from making payment. The question has arisen whether such deposits are subject to this Part 204 and Part 217 of this chapter (Regs. D and Q), and this interpretation is intended as a clarification.

(b) Section 19 of the Federal Reserve Act provides that the limitations prescribed therein on rates of interest paid on deposits are not applicable to deposits of a member bank "payable only at an office thereof located outside the States of the United States and the District of Columbia" (12 U.S.C. 371a). The Board ruled in 1918 that the requirements of section 19 as to reserves to be carried by member banks also do not apply to foreign branches (1918 Federal Reserve Bulletin 1123).

(c) In the Board's judgment, the applicability of these exemptions from Regulation Q and Regulation D is limited to deposits in foreign branches as to which the depositor is entitled, under his agreement with the bank, to demand payment only outside of the United States, regardless of special circumstances. Said exemptions are intended principally to enable foreign branches of U.S.

banks to compete on a more nearly equal basis with other banks in foreign countries in accordance with the laws and regulations of those countries. A customer who makes a deposit that is payable solely at a foreign branch assumes whatever risk may exist that the foreign country might impose restrictions on withdrawals. When payment of a deposit in a foreign branch is guaranteed by a promise of payment at a banking office in the United States if not paid at the foreign office, the depositor no longer assumes such risk, but enjoys substantially the same rights as if the deposit had been made in a U.S. office of the bank. To assure the effectiveness of Regulations D and Q and to prevent evasions thereof, the Board considers that such guaranteed foreign-branch deposits must be subject to those regulations.

(d) Accordingly, a deposit in a foreign branch of a member bank that is guaranteed by a domestic office is subject to the interest rate limitations and reserve percentages of Regulations Q and D the same as if the deposit had been made in the domestic office.

(e) This interpretation is not designed in any respect to prevent the head office of a U.S. bank from repaying borrowings from, making advances to, or supplying capital funds to its foreign branches.

§ 217.146 Deposits at foreign branches guaranteed by domestic office of member bank.

For text of this interpretation see § 204.112 of this subchapter.

* * * *

## APPENDIX I

## COMMITTEE ON BANKING REGULATIONS AND SUPERVISORY PRACTICES: REVISED BASLE CONCORDAT ON PRINCIPLES FOR THE SUPERVISION OF BANKS' FOREIGN ESTABLISHMENTS*

*Introductory comment to the revised Concordat*

The Committee on Banking Regulations and Supervisory Practices was inaugurated in 1975 under the auspices of the Bank for International Settlements in recognition of the growing importance of the international banking system to the functioning of the world economy. The formation of the Committee represented a pioneering effort to foster greater coordination and cooperation among banking supervisors in the industrial countries in the interest of a healthy international banking system. Among the first tasks undertaken by the Committee was to seek some general agreement about the respective roles of home country and host country supervisors and to assure that banking organizations operating in international banking markets were all supervised institutions. That agreement was contained in a document that came to be known as the Concordat and was concerned with relative supervisory responsibilities with respect to solvency, liquidity and foreign exchange opera-

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* [The introductory comment to the revised Concordat was prepared for *International Legal Materials* by Frederick R. Dahl of the U.S. Federal Reserve System.

[The text of the revised Concordat begins at I.L.M. page 901. The original 1975 Concordat, released to the public in March 1981, is reproduced in International Monetary Fund, *International Capital Markets: Recent Developments and Short-Term Prospects, 1981*, Occasional Paper No. 7 (August 1981), pp. 29-32.

[The U.S. Comptroller of the Currency and the Federal Reserve Board announced amendments to their minimum capital guidelines on June 13, 1983. They are reproduced at I.L.M. page 930.]

tions. The principles contained in the original Concordat were subscribed to not only by the supervisors represented on the Committee but subsequently by the major supervisory authorities around the world as well.

A revision of the Concordat was recently undertaken by the Committee to clarify certain aspects and to make it better reflect the experience of the intervening years. The revised Concordat, which was made public in early June, emphasizes that it is concerned only with supervisory responsibilities and not with those of lenders of last resort. It also incorporates the principle of supervising banking institutions on a consolidated world wide basis. The mutuality of responsibilities between home and host country authorities is underscored as is the consequent need for cooperation and coordination between them.

## COMMITTEE ON BANKING REGULATIONS AND SUPERVISORY PRACTICES [*]

*Principles for the supervision of banks' foreign establishments*

* * * *

### IV. *Aspects of the supervision of banks' foreign establishments*

The supervision of banks' foreign establishments is considered in this report from three different aspects: solvency, liquidity, and foreign exchange operations and positions. These aspects overlap to some extent. For instance, liquidity and solvency questions can shade into one another. Moreover, both liquidity and solvency con-

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* [Reproduced from the text provided by the Board of Governors of the Federal Reserve System. The document is dated May 1983.

[The Basle Committee is composed of representatives from twelve industrial countries—Belgium, Canada, the Federal Republic of Germany, France, Italy, Japan, Luxembourg, the Netherlands, Sweden, Switzerland, the United Kingdom, and the United States.]

siderations arise in the supervision of banks' foreign exchange operations and positions.

1. *Solvency*

The allocation of responsibilities for the supervision of the solvency of banks' foreign establishments between parent and host authorities will depend upon the type of establishment concerned.

For branches, their solvency is indistinguishable from that of the parent bank as a whole. So, while there is a general responsibility on the host authority to monitor the financial soundness of foreign branches, supervision of solvency is primarily a matter for the parent authority. The "dotation de capital" requirements imposed by certain host authorities on foreign branches operating in their countries do not negate this principle. They exist firstly to oblige foreign branches that set up in business in those countries to make and to sustain a certain minimum investment in them, and secondly, to help equalise competitive conditions between foreign branches and domestic banks.

For subsidiaries, the supervision of solvency is a joint responsibility of both host and parent authorities. Host authorities have responsibility for supervising the solvency of all foreign subsidiaries operating in their territories. Their approach to the task of supervising subsidiaries is from the standpoint that these establishments are separate entities, legally incorporated in the country of the host authority. At the same time parent authorities, in the context of consolidated supervision of the parent banks, need to assess whether the parent institutions' solvency is being affected by the operations of their foreign subsidiaries. Parental supervision on a consolidated basis is needed for two reasons: because the solvency of parent banks cannot be adequately judged without taking account of all their foreign establishments; and because parent banks cannot be indifferent to the situation of their foreign subsidiaries.

For joint ventures, the supervision of solvency should normally, for practical reasons, be primarily the responsibility of the authorities in the country of incorporation. Banks which are shareholders in consortium banks cannot, however, be indifferent to the situation of their joint ventures and may have commitments to these establishments beyond the legal commitments which arise from their shareholdings, for example through comfort letters. All these commitments must be taken into account by the parent authorities of the shareholder banks when supervising their solvency. Depending on the pattern of shareholdings in joint ventures, and particularly when one bank is a dominant shareholder, there can also be circumstances in which the supervision of their solvency should be the joint responsibility of the authorities in the country of incorporation and the parent authorities of the shareholder banks.

2. *Liquidity*

References to supervision of liquidity in this section do not relate to central banks' functions as lenders of last resort, but to the responsibility of supervisory authorities for monitoring the control systems and procedures established by their banks which enable them to meet their obligations as they fall due including, as necessary, those of their foreign establishments.

The allocation of responsibilities for the supervision of the liquidity of banks' foreign establishments between parent and host authorities will depend, as with solvency, upon the type of establishment concerned. The host authority has responsibility for monitoring the liquidity of the foreign bank's establishments in its country; the parent authority has responsibility for monitoring the liquidity of the banking group as a whole.

For branches, the initial presumption should be that primary responsibility for supervising liquidity rests with the host authority. Host authorities will often be best

equipped to supervise liquidity as it relates to local practices and regulations and the functioning of their domestic money markets. At the same time, the liquidity of all foreign branches will always be a matter of concern to the parent authorities, since a branch's liquidity is frequently controlled directly by the parent bank and cannot be viewed in isolation from that of the whole bank of which it is a part. Parent authorities need to be aware of parent banks' control systems and need to take account of calls that may be made on the resources of parent banks by their foreign branches. Host and parent authorities should always consult each other if there are any doubts in particular cases about where responsibilities for supervising the liquidity of foreign branches should lie.

For subsidiaries, primary responsibility for supervising liquidity should rest with the host authority. Parent authorities should take account of any standby or other facilities granted as well as any other commitments, for example through comfort letters, by parent banks to these establishments. Host authorities should inform the parent authorities of the importance they attach to such facilities and commitments, so as to ensure that full account is taken of them in the supervision of the parent bank. Where the host authority has difficulties in supervising the liquidity, especially in foreign currency, of foreign banks' subsidiaries, it will be expected to inform the parent authorities and appropriate arrangements will have to be agreed so as to ensure adequate supervision.

For joint ventures, primary responsibilities for supervising liquidity should rest with the authorities in the country of incorporation. The parent authorities of shareholders in joint ventures should take account of any standby or other facilties granted as well as any other commitments, for example through comfort letters, by shareholder banks to those establishments. The authorities in the country of incorporation of joint ventures

should inform the parent authorities of shareholder banks of the importance they attach to such facilities and commitments so as to ensure that full account is taken of them in the supervision of the shareholder bank.

Within the framework of consolidated supervision, parent authorities have a general responsibility for overseeing the liquidity control systems employed by the banking groups they supervise and for ensuring that these systems and the overall liquidity position of such groups are adequate. It is recognised, however, that full consolidation may not always be practicable as a technique for supervising liquidity because of differences of local regulations and market situations and the complications of banks operating in different time zones and different currencies. Parent authorities should consult with host authorities to ensure that the latter are aware of the overall systems within which the foreign establishments are operating. Host authorities have a duty to ensure that the parent authority is immediately informed of any serious liquidity inadequacy in a parent bank's foreign establishment.

* * * *